178

①

Supreme Court, U.S.
FILED

10-752 DEC 2 - 2010

OFFICE OF THE CLERK

No. 10-

IN THE

Supreme Court of the United States

DUSTIN DRESSNER,

Petitioner,

v.

STATE OF LOUISIANA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE LOUISIANA SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

G. BEN COHEN*
BIDISH SARMA

THE CAPITAL APPEALS PROJECT
636 Baronne Street
New Orleans, LA 70113
(504) 529-5955
benc@thejusticecenter.org

**Counsel of Record for Petitioner*

LEGAL PRINTERS LLC, Washington DC • 202-747-2400 • legalprinters.com

CAPITAL CASE

QUESTION PRESENTED

In *Snyder v. Louisiana*, this Court held that the Jefferson Parish District Attorney's Office had intentionally discriminated on the basis of race during jury selection. This case arises from the same judicial district as *Snyder*. Here, the Louisiana Supreme Court's *Batson* analysis: supplied entirely new justifications the trial prosecutor did not offer; ignored instances where the record contradicted the State's explanation; upheld explanations that the prosecutor struck African-Americans because they favored the State; and refused to consider extensive statistical and historical evidence of race discrimination in jury selection because it found that the State proffered race-neutral explanations.

The question presented is: whether the Louisiana Supreme Court's *Baston* analysis so contravened this Court's rulings in *Miller-El v. Dretke*, 545 U.S. 231 (2005), and *Snyder v. Louisiana*, 552 U.S. 472 (2008), that it "has decided an important federal question in a way that conflicts with relevant decisions of this Court?"

PARTIES TO THE PROCEEDING

The petitioner is Dustin Dressner, the defendant and defendant-appellant in the courts below. The respondent is the State of Louisiana, the plaintiff and plaintiff-appellee in the courts below.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES vi

PETITION FOR A WRIT OF CERTIORARI 1

OPINION BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS INVOLVED 1

INTRODUCTION 2

STATEMENT OF THE CASE 8

REASONS FOR GRANTING THE WRIT 10

I. THE LOUISIANA SUPREME COURT'S OPINION DEFIES *MILLER-EL II* AND *SNYDER* 11

    A. The Louisiana Supreme Court Supplied a New Justification for the State's Peremptory Strike Against an African-American Juror 11

    B. The Louisiana Supreme Court Ignored Evidence that the Prosecutor Mischaracterized an African-American Juror's Testimony 14

    C. The Louisiana Supreme Court Did Not Consider Whether the State's Race-Neutral Explanations Based on Jurors' Views Indicating They Would Be Pro-State Constituted Evidence of Pretext 18

D. The Louisiana Supreme Court's Approach to Historical Evidence of Discrimination Renders It Impossible to Prove Discriminatory Intent Where a Prosecutor Gives a Race-Neutral Explanation for a Peremptory Strike 20

E. The Louisiana Supreme Court Ignored Startling Statistical Evidence Underlying the *Batson* Claim 23

II. THE STATE'S EXPLANATIONS FOR ITS PEREMPTORY STRIKES ARE INSUFFICIENT AND PRETEXTUAL 25

A. The State's Explanation for Striking Juror Selina Paul is Contradicted by the Record, Implausible, Contrary to Trial Strategy, and Does Not Survive a Side-by-Side Analysis with Similarly-Situated White Jurors 25

B. The State Provided an Illegitimate Gender-Based Explanation for the Strike Against Juror Robert Ratcliff 30

C. The State's Explanation for Striking Juror Joseph Woods Mischaracterizes His Responses and is Implausible 33

III. THE LOUISIANA SUPREME COURT'S PIERCING REVIEW OF THE DEFENSE'S PEREMPTORY STRIKE REINFORCES A DOUBLE-STANDARD THAT DISADVANTAGES RACIAL MINORITIES 34

CONCLUSION 40

APPENDIX A
Opinion of Louisiana Supreme Court 1A

APPENDIX B
Unpublished Appendix to Opinion of Louisiana Supreme Court 79A

APPENDIX C
Denial of Rehearing 199A

TABLE OF AUTHORITIES

Cases

Batson v. Kentucky, 476 U.S. 79 (1986)............*passim*

Brosseau v. Haugen, 543 U.S. 194 (2004) 10

Holloway v. Horn, 355 F.3d 707 (3d Cir. 2004)........13

J.E.B. v. Alabama, 511 U.S. 127 (1994).............31, 32

Johnson v. California, 545 U.S. 162 (2005) 13, 33

Mahaffey v. Page, 162 F.3d 481 (7th Cir. 1998).......32

Miller-El v. Cockrell, 537 U.S. 322 (2003)........*passim*

Miller-El v. Dretke, 545 U.S. 231 (2005) ....*passim*

Paulino v. Castro, 371 F.3d 1083 (9th Cir. 2004) 13

Purkett v. Elem, 514 U.S. 765 (1995) 25, 31

Smith v. United States, 502 U.S. 1017 (1991)............4

Snyder v. Louisiana, 545 U.S. 1137 (2006)................2

Snyder v. Louisiana, 552 U.S. 472 (2008)........*passim*

State v. Anderson, 996 So. 2d 973 (La. 2008).........3, 4

State v. Coleman, 970 So. 2d 511 (La. 2007)............32

State v. Dressner, ___ So. 3d ___ (La. 2010); 08-1366 (La. 07/06/10); 2010 La. LEXIS 1656 .... 1, 4

State v. Harris, 820 So. 2d 471 (La. 2002) 32

State v. Jacobs, 32 So. 3d 227 (La. 2010) 30

State v. Snyder, 750 So. 2d 832 (La. 1999)........... 2, 21

State v. Snyder, 942 So. 2d 484 (La. 2006)............ 2, 3

Thaler v. Haynes, 130 S. Ct. 1171 (2010) 10

United States v. Ochoa-Ochoa, 114 Fed. Appx. 295 (9th Cir. 2004) 32

Valdez v. People, 966 P.2d 587 (Colo. 1998) 32

Wilwording v. Swenson, 404 U.S. 249 (1971) 10

Constitutional Provisions and Statutes

28 U.S.C. § 1257(a) 1

U.S. CONST. AMEND. XIV 1, 3, 30, 32

Miscellaneous

Brief of Nine Jefferson Parish Ministers, as Amici Curiae Supporting Petitioner, Snyder v. Louisiana, 552 U.S. 472 (2008) 22

Jeffrey Gettleman, *Prosecutors' Morbid Neckties Stir Criticism*, N.Y. TIMES, Jan. 5, 2003, at A14 22

Oral Argument Transcript, *State v. Dressner* (No. 08-KA-1366), May 12, 2010 .... 5, 16

Sheri L. Johnson, *The Language and Culture (Not to Say Race) of Peremptory Challenges*, 35 WM. & MARY L. REV. 21 (1993) 23

PETITION FOR A WRIT OF CERTIORARI

Petitioner Dustin Dressner respectfully petitions for a writ of certiorari to review the judgment of the Louisiana Supreme Court in this case.

OPINION BELOW

The Louisiana Supreme Court's opinion is reported at ___ So. 3d ___ (La. 2010); 08-1366 (La. 07/06/10); 2010 La. LEXIS 1656 and is reprinted in the Appendix at App. A.

JURISDICTION

The Louisiana Supreme Court entered its opinion on July 6, 2010. That court denied Mr. Dressner's timely petition for rehearing on September 3, 2010. This Court has jurisdiction under 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment provides in relevant part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV.

INTRODUCTION

This Court has already expended considerable resources attempting to correct the Louisiana Supreme Court's begrudging approach to claims of discrimination in jury selection under *Batson v. Kentucky*, 476 U.S. 79 (1986). In its original decision in Allen Snyder's direct appeal, the Louisiana Supreme Court rejected the *Batson* claim and voted to affirm the conviction and sentence in a 4-2 opinion. *See State v. Snyder*, 750 So. 2d 832 (La. 1999).[1] In 2006, this Court granted the writ of certiorari, vacated the judgment, and remanded the case to the Louisiana Supreme Court for "further consideration in light of *Miller-El v. Dretke* . . . ." *Snyder v. Louisiana*, 545 U.S. 1137, 1137 (2006). On remand, the Louisiana Supreme Court again rejected the *Batson* claim, this time by a 4-3 margin. *See State v. Snyder*, 942 So. 2d 484 (La. 2006).[2] In

---

[1] Then-Chief Justice Calogero did not sit on the panel. *See Snyder*, 750 So. 2d at 835. Then-Justice Kimball (now the Chief Justice) wrote the majority opinion. Justices Lemmon and Johnson dissented from the majority's *Batson* ruling. *See id.* at 863-64 (Lemmon, J., dissenting); *id.* at 866-67 (Johnson, J., dissenting). Justice Lemmon would have required a new trial, *see id.* at 864, whereas Justice Johnson would have remanded for resentencing, *see id.* at 867.

[2] Then-Justice Kimball, who wrote the original majority opinion, dissented on remand, along with Chief Justice Calogero and Justice Johnson. *See Snyder*, 942 So. 2d at 500-05 (Kimball, J., dissenting) (joined by Calogero, C.J.); *id.* at 505-09 (Johnson, J., dissenting).

2007, this Court granted certiorari again and in 2008 it reversed Mr. Snyder's capital conviction in a 7-2 opinion because it found the State's explanation of a peremptory strike against an African-American juror implausible. *See Snyder v. Louisiana,* 552 U.S. 472, 483 (2008). Rather than meaningfully enforce *Batson*'s protections after *Snyder,* the Louisiana Supreme Court appears to have dug in its heels, stonewalling efforts of those who seek to prevent and redress racial discrimination in jury selection. That court has flouted this Court's guidance, reverting instead to the same empty approach that this Court has emphatically rejected. *See, e.g., Miller-El v. Cockrell,* 537 U.S. 322 (2003) [hereinafter *Miller-El I*]; *Miller-El v. Dretke,* 545 U.S. 231 (2005) [hereinafter *Miller-El II*].

This petition presents the Court with the question of whether the Louisiana Supreme Court continues to misapply the law under *Batson.* Mr. Dressner – who, like Mr. Snyder, was prosecuted by the Jefferson Parish District Attorney's Office – presented the Louisiana Supreme Court with its second *Batson* challenge in a capital case since the *Snyder* remand.[3] The result inspires little hope for the Fourteenth Amendment in the Pelican State.

---

[3] That court denied the defense argument that the trial court erred in failing to find a *prima facie* case under *Batson* in *State v. Anderson.* 996 So. 2d 973, 1004-06 (La. 2008). Its analysis apparently turned on possible reasons for the peremptory strikes, although the issue was that the trial court did not

At the time Mr. Dressner went to trial, the record shows that Jefferson Parish prosecutors used peremptory strikes to effectively silence the voice of African-American jurors in approximately 80% of criminal trials.

In *State v. Dressner*,[4] the Louisiana Supreme Court relegated its analysis of Mr. Dressner's *Batson* claims to an unpublished appendix[5] even though Petitioner dedicated to the issue 39 of 82 pages in

---

require the State to provide its reasons. *See, e.g.*, *id.* at 1005 ("A review of his responses suggest possible race-neutral reasons for the state's peremptory challenge, although never articulated as such by the state.").

[4] Chief Justice Kimball, who had authored a dissent on the *Snyder* remand, did not participate in this decision. *See* App. A at 2A. Another dissenter from the *Snyder* remand opinion, former Chief Justice Calogero, retired from the Louisiana Supreme Court in 2008.

[5] The Louisiana Supreme Court's failure to deal with the *Batson* issue in the published portion of its opinion does not diminish the significance of the constitutional issues. *Cf. Miller-El I*, 537 U.S. at 347 ("This failure [to mention parts of the *Batson* claim], however, does not diminish [the] significance [of those claims]."). Indeed, locating the claim in an unpublished appendix may represent an attempt to evade review. *See Smith v. United States*, 502 U.S. 1017, 1020 n.* (1991) (Blackmun, J., dissenting from the denial of certiorari) ("The fact that the Court of Appeals' opinion is unpublished is irrelevant. Nonpublication must not be a convenient means to prevent review. An unpublished opinion may have a lingering effect in the [jurisdiction] and surely is as important to the parties concerned as is a published opinion.").

the original brief (48%), 23 of 26 pages in the reply brief (88%), and all 37 minutes of his oral argument (100%). At oral argument, one Justice expressed doubt that a white defendant could prevail on the claim that the State excluded African-Americans from his jury unless the prosecutors disclosed why they opted to discriminate against African-Americans. *See* Oral Argument Transcript at 14-16.[6] Another suggested that the Equal Protection Clause does not protect the accused or potential jurors when crimes charged are not racially motivated. *See id.* at 46; *see also* App. A at 62A ("Race did not appear to be a motivating factor in defendant's decision to attack the Fasullos in their home.").

In the unpublished appendix, the court's treatment of the *Batson* claim exemplifies the term 'perfunctory.' Although *Miller-El II* recognized the "power[ ]" of "bare statistics," the *Dressner* opinion glossed over the fact that the State excluded 78% of qualified African-American jurors, but only struck 10% of qualified whites. 545 U.S. at 241. Despite this Court's holding that "history [can] suppl[y]" evidence of race discrimination in jury selection, the Louisiana Supreme Court turned the analysis on its head, using the State's proffered race-neutral justifications to inform its view of Jefferson Parish's checkered history rather than vice-versa. *Id.* at 266.

---

[6] A transcript of the oral argument was produced by Alderson Reporting, and is on file with Petitioner's lawyers as well as Alderson.

Whereas the *Miller-El II* Court relied heavily upon "side-by-side comparisons of some black venire panelists who were struck and white panelists allowed to serve," the Louisiana Supreme Court wholly ignored these comparisons. *Id.* at 241.

The Louisiana Supreme Court disregarded other obvious signs of discrimination, including:

- explanations that the State struck African-American jurors because their views leaned in the State's favor (Jurors Selina Paul, Joseph Woods, Robert Ratcliff, Pamela Parker, and Gemayel Holloway);
- instances where the record directly contradicts the State's explanations (Jurors Selina Paul and GeJoan Garrett); and,
- State strikes uninformed by prosecutorial questioning (Jurors Joseph Woods, Robert Ratcliff, Tammie Frazier, and GeJoan Garrett).

The court not only eased its scrutiny of the State's explanations, but also proactively undermined *Batson*'s purpose:

- it supplied an entirely new justification that the trial prosecutor did not offer (Juror Tammie Frazier);
- it assumed facts not in the record (Jurors Robert Ratcliff and GeJoan Garrett); and,

- it allowed the State to provide an explicitly gender-based reason (Juror Robert Ratcliff).

Though neither the trial court nor the Louisiana Supreme Court found a *Batson* problem with the State's strikes, both held that defense counsel had discriminated against a prospective white juror. These findings give pause because the defense's proffered reason that these courts rejected suffered from exactly the same shortcoming as one of the State's proffered reasons for a strike against a prospective African-American juror.

The Louisiana Supreme Court not only validated the trial court's unequal treatment of the parties, but amplified it. The Louisiana Supreme Court scoured the record and jury questionnaires to supply new reasons to justify the State's exclusion of African-Americans, but refused to do the same for the Petitioner's exclusion of a white juror, instead declaring that defense counsel's failure to rely on obviously valid and available reasons was evidence of discriminatory intent. Moreover, the court faulted the defense for its failure to question a white juror about issues related to its decision to strike her, but failed to subject the State to similar scrutiny although it failed to question several African-American jurors about the issue that later formed the alleged basis of the prosecutors' peremptory strikes.

The Louisiana Supreme Court's opinion is a remarkable departure from *Miller-El II* and *Snyder*, and it undermines nearly every conceivable judicial precept that exists in this Court's *Batson* jurisprudence. Its opinion is a pronouncement that the road to relief under *Batson* must go through the Supreme Court of the United States.

STATEMENT OF THE CASE

Dustin Dressner was convicted of first-degree murder in Jefferson Parish and sentenced to death by a jury from which the prosecutors peremptorily struck seven of nine of the African-American jurors qualified to serve. Only one African-American juror participated on the jury.

Defense counsel first raised the *Batson* objection when the State used its second peremptory strike against a second African-American juror. It renewed the objection when the State struck a third consecutive African-American, and the trial court found a *prima facie* case had been established. The trial court required the State to provide race-neutral explanations for the previous three strikes against African-Americans, and subsequently required explanations for the five additional strikes against prospective African-American jurors (including one potential alternate).

The State put forth all manner of explanations for its strikes, even going so far as to eliminate African-American jurors because they espoused views that were pro-prosecution. And, on one occasion, the State argued that it did not discriminate on the basis of race because it instead discriminated on the basis of gender: "[that male juror] would be sympathetic to the defendant, given that the defendant is a young male." In the end, the State struck prospective African-American jurors at nearly eight times the rate it struck prospective white jurors.

The trial court and Louisiana Supreme Court upheld all of the State's peremptory strikes.

On appeal, the Louisiana Supreme Court abandoned its role to review "all of the circumstances" which would indicate the trial court erred in failing to find that race motivated the peremptory strikes. *Snyder*, 552 U.S. at 478. In one instance, it supplied a reason the prosecutor never cited at trial (or even on appeal). *See* App. B at 98-99A. It also acknowledged but failed to meaningfully consider instances where the record contradicted the State's explanation (thus suggesting that the prosecutor mischaracterized the juror's statements). *See* App. B at 111A n.15. It never addressed Petitioner's claim that the State's exclusion of pro-State jurors demonstrates pretext. It eradicated the import of historical evidence of race discrimination, using the State's explanations to inform its view of history rather than using history to inform its view of the State's strikes. *See* App. B at 134A. And, it failed to mention—let alone address—the compelling statistical evidence presented. Thus, the Louisiana Supreme Court effectively disregarded *Miller-El II* and proclaimed that *Batson* would have no teeth on its watch.

REASONS FOR GRANTING THE WRIT

The Louisiana Supreme Court's *Batson* analysis conflicts with this Court's precedents, and requires reversal.

This Court's action is critical at this time for at least three reasons. First, the Court should make clear that courts must faithfully employ the *Miller-El II* framework in order to give *Batson* meaning. Second, this Court should prevent lower courts from reading the decision in *Thaler v. Haynes*, 130 S.Ct. 1171 (2010), as a reason to curtail the scope and depth of their *Batson* analyses, as the Louisiana Supreme Court did here. *See* App. B at 87A (stating that the Court has left the *Batson* "landscape completely unchanged"). Third, Louisiana courts are in need of clear guidance: the Louisiana Supreme Court's approach will devastate efforts to redress racial discrimination in jury selection state-wide.

The state court's failure to conduct the analysis required under *Miller-El II* and *Snyder* is so egregious that it warrants the special remedy of summary reversal. *See, e.g., Brosseau v. Haugen*, 543 U.S. 194, 198 n.3 (2004) (per curiam) (summary reversal is appropriate to "correct a clear misapprehension" of federal law); *Wilwording v. Swenson*, 404 U.S. 249, 253 (1971) (Burger, C.J., dissenting) (noting summary reversal is appropriate where the error is "manifest").

I. THE LOUISIANA SUPREME COURT'S OPINION DEFIES *MILLER-EL II* AND *SNYDER*

A. The Louisiana Supreme Court Supplied a New Justification for the State's Peremptory Strike Against an African-American Juror

In disposing of the Petitioner's claim that the State intentionally discriminated against prospective juror Tammie Frazier, the Louisiana Supreme Court reached past the trial prosecutor's proffered explanations and beyond the State's appellate brief to locate a reason to justify its decision. At trial, the prosecutor gave the following explanation for the strike:

> With regard to Ms. Frazier, she also gave conflicting responses. She put B and D on the questionnaire. B is, I'm strongly in favor, and D is, I'm generally opposed. Furthermore, she stated yesterday, if I have to, I will. Not only that, Judge, she wasn't completely honest with us when she was filling out the questionnaire, because on the questionnaire, she neglected to indicate that she herself had been arrested for drugs. I don't feel comfortable. I don't feel that she is a strong death penalty juror.

R. 2276-77. Both at trial and on appeal the defense contested the legitimacy of this explanation – as Juror Frazier had in fact approached the court on her own accord and informed the prosecution of her arrest, and her answers on the death penalty were aligned with several white jurors the State did not strike.

In its opinion, the Louisiana Supreme Court went beyond the trial prosecutor's reasons to identify an entirely new justification located in Ms. Frazier's jury questionnaire: that her brother had been convicted of a crime. The court transformed Ms. Frazier's brother's conviction into an underlying explanation for the strike: "her brother's incarceration provided [a] race-neutral reason[ ] for the State's peremptory strike. . . . This Court has considered the fact a family member is a convicted criminal a racially-neutral reason for excluding a prospective juror." App. B at 98A (internal citations omitted). The court's reliance on a reason that the trial prosecutor never provided flies in the face of this Court's jurisprudence.[7] In *Miller-El II*, this Court noted that "when illegitimate grounds like race are in issue, a prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives." 545 U.S. at 252. *Batson* does not leave room for appellate counsel—

---

[7] On appeal, the State argued that Ms. Frazier was not similarly situated to prospective white jurors because "her brother received a prison sentence and she had friends and family who had been arrested for 'all kinda things.'" *State's Brief* at 42. However, the State never claimed in the trial court or on appeal that the prosecutor struck Ms. Frazier because of her brother's criminal conviction.

or, as here, an appellate court—to manufacture new explanations for peremptory strikes where the real reasons were already provided at trial. *See, e.g., id.* ("A *Batson* challenge does not call for a mere exercise in thinking up any rational basis. If the stated reason does not hold up, its pretextual significance does not fade because . . . an appeals court can imagine a reason that might not have been shown up as false."); *Johnson v. California*, 545 U.S. 162, 173 (2005) (noting the "imprecision of relying on judicial speculation to resolve plausible claims of discrimination").[8] The Louisiana Supreme Court's opinion ignores the *Miller-El II* and *Johnson* holdings, and suggests that Louisiana courts may intervene in future *Batson* disputes with their own reserve of reasons the State should have excluded prospective minority jurors.

---

[8] *See also Holloway v. Horn*, 355 F.3d 707, 725 (3d Cir. 2004) ("apparent or potential reasons do not shed any light on the prosecutor's intent . . . when making the peremptory challenge") (internal citation omitted); *Paulino v. Castro*, 371 F.3d 1083, 1090 (9th Cir. 2004) ("But it does not matter that the prosecutor might have had good reasons to strike the prospective jurors. What matters is the *real* reason they were stricken.") (emphasis in original).

B. The Louisiana Supreme Court Ignored Evidence that the Prosecutor Mischaracterized an African-American Juror's Testimony

Although Petitioner urged the Louisiana Supreme Court to recognize that the falsity of explanations provides evidence of pretext and discriminatory intent, the court effectively ignored this evidence. At trial, the prosecutor gave the following race-neutral explanation for striking Ms. Selina Paul: "With regard to Ms. Paul, Judge . . . In response to questioning by defense counsel yesterday, during the *Witherspoon* process, she answered definitely, and this answer was emphatic, definitely, I cannot consider mercy, when they were going through the mitigating circumstances." R. 2448-49.[9]

---

[9] The prosecutor also said:

> [S]he circled "D" on the questionnaire . . . . Furthermore, when I was giving the examples in my voir dire, she seemed to be confused with regard to intoxication and specific intent. . . . Furthermore . . . [s]he volunteered information [to defense counsel]. Not once during my voir dire or any other questioning that I asked her, did she volunteer any information.

R. 2448-49. Significantly, the State on appeal relied only on Ms. Paul's response in the jury questionnaire, apparently conceding Petitioner's argument that the other reasons (about mercy, confusion of intoxication and specific intent, and volunteering information to defense counsel) were contradicted by the

Despite the trial prosecutor's seemingly vivid memory that Ms. Paul "definitely, and this answer was emphatic" could not consider mercy, the record shows that she never gave this response. In fact, she said without hesitation that she could consider all the mitigating factors. *See* App. B at 109A. The Louisiana Supreme Court acknowledged that Petitioner was factually correct in that the prosecutor had supplied reasons that apparently applied to a different African-American juror rather than Ms. Paul, but rejected the legal argument that evidence of falsity indicates that the explanation was pretextual:

> [A] review of her voir dire responses as a whole does not indicate she "emphatically" told either side she could not consider mercy, as the prosecutor stated in his reasons. Admittedly, the State gave four articulations in a row, and it appears the State may have confused this juror's responses with those of another.

App. B at 111A n.15. The Louisiana Supreme Court rejected Petitioner's claim that the prosecutor's error was evidence of pretext. The court then further demonstrated its erroneous belief that the issue on

---

record. *See State's Brief* at 45; *see also Brief on Appeal* at 35-37.

appeal was the juror's view of mercy,[10] rather than the prosecutor's use of false explanations: "At any rate, even assuming Ms. Paul did not oppose mercy, as the prosecutor articulated, the remaining reasons provided support for the race-neutral reasons in excusing her from the jury."[11] *Id.* Contrary to the court's position, the inquiry does not turn on whether Ms. Paul could consider mercy; it turns on whether the prosecutor "mischaracterized [the juror's] testimony." *Miller-El II*, 545 U.S. at 244; *see also Miller-El I*, 537 U.S. at 339 ("the issue comes down to whether the trial court finds the prosecutor's race-neutral explanations to be credible"); *Snyder*, 552 U.S. at 477 ("Step three of the *Batson* inquiry involves an evaluation of the prosecutor's credibility . . . .").[12] A court committed to properly enforcing *Batson* would have grasped that fundamental distinction.[13]

---

[10] Indeed, the Louisiana Supreme Court wholly ignored the Petitioner's separate argument that the State's attempt to justify a peremptory strike on the grounds that the juror would not consider a mitigating circumstance in the penalty phase is inherently suspect. *See Brief on Appeal* at 35 ("Had it been true that Ms. Paul could not consider mercy, a State peremptory strike against her for this reason would appear inexplicable because she would have been more favorable to that party."). Petitioner also pointed out at oral argument that the reason was made even more suspicious because the State employed the very opposite explanation – a prospective juror's tendency to consider mercy – in its strike against a different African-American juror, Ms. Jakeitha Patterson. *See* Oral Argument Transcript at 9-10 (on file with Petitioner's lawyers).

[11] This was just one of several instances where the Louisiana Supreme Court summarily upheld a State strike if it found any one of the prosecutor's explanations reasonable – even where the other ones are contested or contradicted by the record. For example, Petitioner challenged the State's reasons for striking Ms. Jakeitha Patterson. The court summarily disposed of the inquiry, effectively holding that one plausible reason is enough, even if the other reasons suggest pretext: "Ms. Patterson's views on capital punishment constituted a legitimate race-neutral concern." App. B at 109A. *See also id.* at 123A (the court summarily rejected the challenge to the strike of Joseph Woods in one sentence without regard to Petitioner's claim that the State mischaracterized his testimony: "The proffered reasons easily satisfy the criteria for race neutrality set out in Louisiana jurisprudence.").

---

[12] The Louisiana Supreme Court's treatment of Ms. Paul is particularly troubling because the court attempted to explain away the prosecutor's error. In *Miller-El II*, this Court was concerned where the lower court failed to mention that the prosecutor mischaracterized Juror Fields's testimony. *See* 545 U.S. at 247. The opinion here is comparatively worse than the lower court's in *Miller-El II* because the Louisiana Supreme Court mentioned the State's mischaracterization in a footnote, and then summarily disregarded it based on a purported fact that did not have support in the record, and that the State did not even allege.

[13] Petitioner also argued that the record contradicts the prosecutor's claim that Ms. Paul volunteered information to defense counsel. *See Brief on Appeal* at 36-37. The State did not refute this argument. *See State's Brief* at 45. The Louisiana Supreme Court never dealt with this inconvenient fact, but instead held that "the prosecutor's *perception* of Ms. Paul favoring defense questioning over the State's has been found to satisfy the criteria for race neutrality . . . ." App. B at 112A (emphasis added). Where that perception, however, is based not in reality, but in racism, the peremptory strike cannot stand.

This Court recognized in *Miller-El II*, "[s]ome stated reasons are false . . . ." 545 U.S. at 240. And, "some false reasons are shown up within the four corners of a given case . . . ." *Id.* The demonstrably false reasons in Mr. Dressner's case are significant in the *Batson* analysis because "[i]f any facially neutral reason sufficed to answer a *Batson* challenge, then *Batson* would not amount to much more than *Swain*." *Id.* Indeed, the Louisiana Supreme Court's opinion proves that it does not amount to much at all under these circumstances because the court did not even consider reasons that were "shown up within the four corners" of the record.[14]

C. The Louisiana Supreme Court Did Not Consider Whether the State's Race-Neutral Explanations Based on Jurors' Views Indicating They Would Be Pro-State Constituted Evidence of Pretext

The prosecutor at trial repeatedly claimed that he struck prospective African-American jurors because their voir dire testimony indicated they would have been more favorable to the State than the defense. Petitioner objected, and asserted that these explanations are implausible and pretextual.

---

[14] The court's ruling encourages prosecutors to throw as many explanations as it can at the wall and see what sticks. After all, under the Louisiana Supreme Court's analysis, if one explanation arguably applies, the false explanations have no negative bearing in the *Batson* analysis.

See R. 2461; *Brief on Appeal* at 23-24, 27, 33-34, 35, 41, 43; *Reply Brief* at 10, 18. The Louisiana Supreme Court altogether failed to consider the argument.

Although the court failed to address the claim directly, its opinion ultimately accepted all of the following reasons as legitimate and credible: "[S]he had concerns about the Fifth Amendment. . . . She [would] require[< >] the defense to put on and call witnesses." (R. 2276 – Pamela Parker); "[W]ith regard to the defendant's Fifth Amendment, he said that if the State's case was strong, he would then require the defense to produce – I mean come up with a defense." (R. 2480 – Gemayel Holloway); "[H]is language, he might not hold it [the Fifth Amendment] against him [the defendant], but – and I think that eventually I've got some concerns." (R. 2472 – Joseph Woods). In fact, the court went further, justifying the State's peremptory strike against Ms. Pamela Parker because her "reluctance to accord the defendant the presumption of innocence under the Fifth Amendment could have supported a valid cause challenge." App. B at 104A.[15]

The court's ruling encourages prosecutors to cloak their discriminatory intent by putting on any reason for a strike, even if that reason clearly indicates the juror would favor the State. Where an appellate court upholds reasons like these, it undermines *Miller-El II* because it allows trial courts to abandon their role in determining credibility. *See* 545 U.S. at 247 ("the credibility of reasons given can be measured by 'how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy'") (quoting *Miller-El I*); *id.* (where the State strikes "an ideal juror in the eyes of a prosecutor," "the prosecutors' explanations for the strike cannot reasonably be accepted.").

---

[15] The Louisiana Supreme Court noted that the trial court had denied the State's cause-challenge against Ms. Parker. *See* App. B at 102A ("the district court denied the State's cause challenge").

D. The Louisiana Supreme Court's Approach to Historical Evidence of Discrimination Renders It Impossible to Prove Discriminatory Intent Where a Prosecutor Gives a Race-Neutral Explanation for a Peremptory Strike

The record in this case contains evidence of a history of race discrimination by the Jefferson Parish District Attorney's Office. A study of 390 criminal cases in the parish revealed that the State excluded African-Americans at more than three times the rate of whites, and that African-Americans lacked an effective voice on the jury in about 80% of criminal trials. R 905-09.

Evidence of historical racial discrimination in jury selection practices "is relevant to the extent it casts doubt on the legitimacy of the motives underlying the State's actions" in a particular case. *Miller-El I*, 537 U.S. at 332. Yet, the Louisiana Supreme Court refused to evaluate the relevancy of the Jefferson Parish District Attorney's Office's history because that history "does not lead to the logical conclusion the same happened in the present case." App. B at 134A. The court went on to explain:

> in all of the *Batson* challenges exercised in defendant's capital trial . . . the State gave its reasons on the record for excusing the jurors, and in every challenge, the district court ruled those reasons race-neutral, suggesting a clear intent on the part of the current prosecutors to distance themselves from the errors of their office in the past.

App. B at 134A. The court glossed over two critical facts: (1) in *Snyder*, although "the trial court did not find that defendant had established purposeful discrimination," *see Snyder*, 750 So. 2d at 841, this Court still held that a strike was the product of racial discrimination; and (2) the historical evidence included evaluations of the same prosecutors who tried Mr. Dressner, so they are the very individuals who perpetrated the "errors of their office in the past."[16] Indeed, the prosecutors in this case were the very same ones that *amici* identified in *Snyder* who wore neckties depicting a hangman's noose and a grim reaper in death penalty proceedings. *See Brief of Nine Jefferson Parish Ministers,* as *Amici Curiae Supporting Petitioner, Snyder v. Louisiana*, 552 U.S. 472 (2008) at 13-14 (citing Jeffrey Gettleman, *Prosecutors' Morbid Neckties Stir Criticism*, N.Y. TIMES, Jan. 5, 2003, at A14).

---

[16] Contrary to the court's assertion, the trial prosecutors did not have a "clear intent" to "distance themselves from the errors of their office in the past." In fact, they contested the validity of the historical evidence, arguing it was a "sham." R. 4041. They could not distance themselves from "errors" if they did not recognize them as "errors." Not only did the prosecutors resist acknowledging the history, but they also committed several other "errors" that point toward—not away from—discrimination. *See* Sections I(B); II(A); II(B); II(C).

The Louisiana Supreme Court's disposal of compelling historical evidence by reference to the trial court's second-step *Batson* rulings betrays *Miller-El II*. The race-neutrality of proffered explanations does not terminate the inquiry into discrimination and foreclose the relevance of history; instead, history informs the ultimate question concerning the prosecutor's intent and credibility, and is particularly important where a potentially discriminatory prosecutor does not 'spill the beans' by supplying a non-neutral explanation. Indeed, the court's approach here suggests that if it was confronted with a 'how-to' guide to jury discrimination (akin to the Sparling Manual at issue in *Miller-El II*), the Louisiana Supreme Court would have deferred to fabricated race-neutral justifications, even if it was shown that they came straight from the guidebook.

In reaffirming the rule that a defendant may rely on "all relevant circumstances" to support his *Batson* claim, this Court recognized that "the net [of historical evidence] was not entirely consigned to history, for *Batson*'s individualized focus came with a weakness of its own owing to its very emphasis on the particular reasons a prosecutor might give." *Miller-El II*, 545 U.S. at 240, 241. Here, the Louisiana Supreme Court employed too narrow a focus, blindly accepting the State's race-neutral reasons and holding that they necessarily overrode history's significance. Under the court's holding, it would be impossible to prove discriminatory intent where a prosecutor succeeded in the simple task of providing a race-neutral explanation.[17]

E. The Louisiana Supreme Court Ignored Startling Statistical Evidence Underlying the *Batson* Claim

Petitioner presented extensive statistical evidence to support his claim that the State intentionally discriminated against African-American jurors on the basis of their race. The State used 78% of its strikes to exclude 78% of available African-Americans, who comprised only 31% of the qualified jury pool. On the other hand, the State used only 22% of its strikes to exclude 10% of available whites, who comprised 69% of the qualified jury pool.[18] *See Reply Brief* at 22. Despite this evidence, the Louisiana Supreme Court simply stated, "a review of the voir dire record as a whole indicates the State articulated race and gender-neutral reasons for each of the eight challenges about which defendant now complains." App. B at 94A. The "failure [to mention evidence supporting a *Batson* claim], however, does not diminish [the] significance [of that evidence]." *Miller-El I*, 537 U.S. at 347.

---

[17] *See* Sheri L. Johnson, *The Language and Culture (Not to Say Race) of Peremptory Challenges*, 35 WM. & MARY L. REV. 21, 59 (1993) ("If prosecutors exist who . . . cannot create a 'racially neutral' reason for discriminating on the basis of race, bar examinations are too easy.").

[18] Petitioner also presented statistical evidence to help establish that the State treated African-Americans differently

In *Miller-El II*, this Court held that statistics can provide powerful evidence to support a *Batson* claim. There, "[t]he numbers describing the prosecution's use of peremptories [were] remarkable." 545 U.S. at 240. Indeed, in *Miller-El I*, this Court suggested that statistics alone may suffice to carry a *Batson* claim: "In this case, the statistical evidence alone raises some debate as to whether the prosecution acted with a race-based reason when striking prospective jurors." 537 U.S. at 342. Those opinions left no doubt that courts must meaningfully grapple with the statistical evidence when ruling on

---

than similarly situated white jurors. Of the jurors who circled "D" on the questionnaire, the State struck 100% of the African-Americans, but only 25% of the whites. Of the jurors who initially indicated that they would impose a higher burden of proof on the State in a murder case, the State struck 100% of the African-Americans, but only 50% of the whites. Of the jurors who initially indicated that they may want to hear from the defendant despite his Fifth Amendment rights, the State struck 88% of the African-Americans, but 0% of the whites. *See Reply Brief* at 22.

Batson challenges. The Louisiana Supreme Court's silence on the statistical evidence here is alarming. At best, it suggests that the court treats statistical evidence the same way it treats historical evidence – as irrelevant where the State provides race-neutral explanations. This dismissive approach contravenes *Miller-El I* and *II* and strands litigants seeking to prove discrimination because prosecutors almost never fail to give a passable race-neutral reason.[19]

II. THE STATE'S EXPLANATIONS FOR ITS PEREMPTORY STRIKES ARE INSUFFICIENT AND PRETEXTUAL

A. The State's Explanation for Striking Juror Selina Paul is Contradicted by the Record, Implausible, Contrary to Trial Strategy, and Does Not Survive a Side-by-Side Analysis with Similarly-Situated White Jurors

Selina Paul was the fourth consecutive African-American the State removed from the jury. The prosecutor provided the following explanation for the strike:

> With regard to Ms. Paul, Judge, she circled "D" on the questionnaire, and that . . . response is, "I am generally opposed to the death penalty." In

---

[19] *See supra* note 17; *Purkett v. Elem*, 514 U.S. 765, 768 ("The second step of this process does not demand an explanation that is persuasive, or even plausible. At this [second] step of the inquiry, the issue is the facial validity of the prosecutor's explanation . . . .") (internal quotation omitted).

> response to questioning by defense counsel yesterday, during the Witherspoon process, she answered definitely, I cannot consider mercy, when they were going through the mitigating circumstances. Furthermore . . . she seemed to be confused with regard to intoxication and specific intent. After questioning her again, I had some concerns with whether or not she understood the law with regard to intoxication and specific intent. Furthermore, Paul Fleming was questioning the last panel. She volunteered information. Not once during my voir dire or any other questioning that I asked her, did she volunteer any information.

Each of these four reasons, individually and taken together, is demonstrably pretextual and exposes the State's intent to discriminate.

Initially, the claim that Ms. Paul could not consider mercy is contradicted by the record. *See supra* Section I(B). The State "simply mischaracterized [Ms. Paul's] testimony." *Miller-El II*, 545 U.S. at 244. Moreover, the State's supposed desire to eliminate a juror who would give less consideration to mercy as a mitigating circumstance is suspect where the State is seeking a death sentence. *See supra* note 10. The reason is not just implausible on its face and contrary to a legitimate trial strategy, but it is also internally inconsistent with the State's rationale for other strikes. The State based its peremptory strike against a different African-American juror, Ms. Jakeitha Patterson, on her tendency to consider mercy. R. 2275-76 ("she leans to mercy"). Apparently, the State wanted to strike African-American jurors who would not consider mercy and who would consider mercy. Unsurprisingly, the State approved of very few African-Americans in this jury selection.

Second, the State's claim that it struck Ms. Paul because she circled the letter "D" does not withstand a side-by-side analysis. Petitioner presented a detailed comparative analysis, which the Louisiana Supreme Court's opinion entirely ignored. *See Brief on Appeal* at 37-38. The State failed to strike 75% of the white jurors who circled the letter "D" on their questionnaires, and all those not stricken served on the jury. *See id.* The differential treatment of similarly-situated white-jurors is strong evidence of pretext. *See Miller-El II*, 545 U.S. at 241 ("If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson*'s third step.").

Third, the State claimed it struck Ms. Paul because she was confused about specific intent and intoxication. This claim is demonstrably pretextual. The State did not refute the Petitioner's argument that Ms. Paul's answer to the State's long-winded hypothetical question regarding specific intent and intoxication "did not demonstrate any confusion or a lack of understanding." *Brief on Appeal* at 36. More importantly, Ms. Paul's answer inured to the State's benefit. She clearly stated that she could still find an offender had specific intent even where he was intoxicated, which is precisely what the State wanted. R. 2288 ("I would believe it was intent"). In fact, the State did not challenge a white juror who immediately said that she "agree[d]" with Ms. Paul's answer. R. 2289. Finally, if there was any confusion – which there was not – it likely emanated from the fact that the State asked a long hypothetical question to Ms. Paul at the very beginning of its questioning to the panel.[20] All of the other prospective jurors on that panel had more time to understand what exactly the prosecutor was asking. The prosecutor's claim that Ms. Paul was confused is unsupported by the record, and pretextual given that: she gave an answer favorable to the State; the prosecutor did not challenge a white juror who gave the same exact response; and the State began its entire line of questioning with Ms. Paul.

Fourth, the record does not support the prosecutor's claim that Ms. Paul volunteered information to defense counsel but not the State. The State did not refute Petitioner's contention that "Ms. Paul 'volunteered' much more information to the prosecution. . . . [and] elaborated on her reasoning in a way she did not when asked questions by the defense." *Brief on Appeal* at 37. The record simply does not bear out the prosecutor's attempt to justify the strike.

---

[20] The prosecutor's question to Ms. Paul took up two full transcript pages. R. 2286-87.

Standing alone, none of the reasons the State provided for the strike against Ms. Paul withstands analysis. A cumulative analysis leaves no doubt that the State invented reasons for the strike to conceal its discriminatory intent. Even though three of the four proffered reasons lack record support with respect to Ms. Paul, Petitioner identified a prospective white juror to whom all four reasons apply with full force but whom the State accepted. A side-by-side comparison of that prospective juror with Ms. Paul reinforces the implausibility of the prosecutor's stated reasons. *See Snyder*, 552 U.S. at 483. Juror Karen Rine circled the letter "D", would have trouble considering mercy a mitigating circumstance, seemed confused during voir dire, and volunteered information to defense counsel. *Brief on Appeal* at 37-38. In fact, Ms. Rine was comparatively less favorable to the State than Ms. Paul because she volunteered to defense counsel that she would impose a higher burden of proof on the State in a capital case. R. 2184. Incredibly, the State did not strike her, and she was allowed to serve on the jury. Confronted with a juror that met its unfairly high standard for a similarly-situated juror,[21] the Louisiana Supreme Court ignored the analysis altogether.

B. The State Provided an Illegitimate Gender-Based Explanation for the Strike Against Juror Robert Ratcliff

When prompted to explain the peremptory strike against Mr. Robert Ratcliff, an African-American man, the prosecutor put forth a few reasons, including, "Both Mr. Rowan and I got the impression that he would be sympathetic to the defendant, *given that the defendant is a young male.*" R. 2460 (emphasis added). The State did not respond to the Petitioner's claim that this explanation is insufficient because it relies on gender – an impermissible ground under the Fourteenth Amendment.[22] *See State's Brief* at 45-46. Whether the State relied on gender as a pretext to mask its racial intent or truly excluded Mr. Ratcliff for gender-based reasons, the strike is unconstitutional. *See, e.g.*, *J.E.B. v. Alabama*, 511 U.S. 127, 140 (1994) ("Discrimination in jury selection, whether based on race or on gender, causes harm to the litigants, the community, and the individual jurors who are wrongfully excluded from participation in the judicial process.").

---

[21] In *Miller-El II*, this Court warned, "A *per se* rule that a defendant cannot win a *Batson* claim unless there is an exactly identical white juror would leave *Batson* inoperable; potential jurors are not products of a set of cookie cutters." 545 U.S. 247 n.6. The Louisiana Supreme Court has not heeded that warning. For example, in *State v. Jacobs*, the Louisiana Supreme Court held that "for disparity of treatment to be present, the medical conditions must be truly similar." 32 So. 3d 227, 230 (La. 2010). It then relied on information outside the record to amplify the differences between two prospective jurors' medical conditions and reject the challenge. *Id.*

[22] At trial, the prosecutor also claimed that churches like the one in which Mr. Ratcliff was a deacon "seek out at risk people." R. 2460. The State failed to respond to Petitioner's argument that, "Nowhere does the record disclose that juror

The Louisiana Supreme Court denied Petitioner's claim, holding that it was procedurally barred. *See* App. B at 119A. However, the court ignored that the race-and-gender neutrality of the State's explanation is constitutionally required once a *Batson* objection is lodged. *See, e.g.*, *Purkett v. Elem*, 514 U.S. 765, 768 (1995) (a reason does not survive step two of *Batson* where "a discriminatory intent is inherent in the prosecutor's explanation") (internal quotation and citation omitted). Instead, it imposed upon the Petitioner the novel obligation to

---

Ratcliff's church works with at-risk individuals. The prosecutor asserted this without drawing upon any fact in the record or asking any questions." *Brief on Appeal* at 32. Nonetheless, the Louisiana Supreme Court held, "the prosecutor's perception Ratcliff would be weak on the death penalty given he works with disadvantaged youths is certainly a legitimate race-neutral reason for excusing him.". App. B at 119A. The court relied on information not in the record to support the State's exclusion of African-American jurors.

object twice.[23] Under the court's ruling, a strike would be immune from challenge where the prosecutor claims he did not discriminate on the basis of race because he discriminated instead on the basis of gender (or vice-versa) and defense counsel did not lodge a second objection. This ruling undermines the Fourteenth Amendment protections set forth in *Batson* and *J.E.B. See Miller-El II*, 545 U.S. at 270 (Breyer, J., concurring) ("equal protection principles prohibit excusing jurors on account of gender"); *United States v. Ochoa-Ochoa*, 114 Fed. Appx. 295, 296 (9th Cir. 2004) (ordering a new trial where the prosecutor invoked gender when providing a race-neutral reason: "My main thought about her was that she was young and that she is female.").[24]

---

[23] In the *Application for Rehearing*, the Petitioner noted that the Louisiana Supreme Court did not impose a similar requirement on the defendants in the prior cases in which the State failed to supply a race-and-gender neutral reason for a peremptory strike. *See State v. Harris*, 820 So. 2d 471, 474-75 (La. 2002); *State v. Coleman*, 970 So. 2d 511, 515-16 (La. 2007).

[24] The ruling also overlooked Petitioner's claim that the judicial determination that the State's explanation is adequate at step-two is a legal question subject to *de novo* review on appeal. *See, e.g., Mahaffey v. Page*, 162 F.3d 481, 484 (7th Cir. 1998); *Valdez v. People*, 966 P.2d 587, 591 (Colo. 1998). The Louisiana Supreme Court thus failed to perform its duty to decide the legal correctness of the trial court's decision below.

C. The State's Explanation for Striking Juror Joseph Woods Mischaracterizes His Responses and is Implausible

The State also struck Juror Joseph Woods because of the color of his skin. Petitioner argued that the prosecutor's explanations were insufficient because they misrepresented the juror's answers, indicated that he was more favorable to the State than the defense, and were exposed by a comparative analysis to white jurors. *See Brief on Appeal* at 22-25.

At trial, the prosecutor said, "We feel that he would be highly sympathetic to the defendant given that the defendant is approximately the same age as his son." R. 2472. In response to the Petitioner's argument that the State did not strike any white jurors who also had sons about the same age as the defendant, the State reframed the reason on appeal: "The State submits that it is readily apparent why the State would not want to keep someone as a juror in a capital case who had explicitly compared the defendant to their own son." *State's Brief* at 48. However, Petitioner pointed out that the State had taken Mr. Woods's response out of context because it actually "reflected that Woods would prefer the defendant to present a defense rather than show him sympathy." *Reply Brief* at 15; *see also Brief on Appeal* at 25. More importantly, Petitioner made clear that the State's newly-crafted response should not be considered on appeal. *See Reply Brief* at 15; *see also Johnson*, 545 U.S. at 173; *supra* note 8.

The Louisiana Supreme Court ignored the comparative juror analysis and overlooked the context of Mr. Woods's comments about his son. It instead adopted the State's argument on appeal – without acknowledging Petitioner's claim that this explanation differed materially from what the prosecutor said at trial – and summarily ruled that the reason was sufficient to justify the strike. *See* App. B at 123A ("The proffered reasons easily satisfy the criteria for race neutrality set out in Louisiana jurisprudence.") (citing a single case from an intermediate appellate Louisiana court for the proposition that a peremptory is justified where the juror had grandchildren the same age as defendant). The court did not explain why the State's failure to strike white jurors who also had children about the same age as the defendant was not probative,[25] and altogether ignored the other (pretextual) reasons given at trial. This analysis skirts this Court's requirements. *See Snyder*, 552 U.S. at 478 ("all of the circumstances that bear upon the issue of racial animosity must be consulted") (citing *Miller-El II*).

III. THE LOUISIANA SUPREME COURT'S PIERCING REVIEW OF THE DEFENSE'S PEREMPTORY STRIKE REINFORCES A DOUBLE-STANDARD THAT DISADVANTAGES RACIAL MINORITIES

While the Louisiana Supreme Court systematically failed to perform a meaningful *Batson* analysis when reviewing Petitioner's claims, it demonstrated it could do the job when reviewing the State's reverse-*Batson* challenge. The trial court and state supreme court's differential treatment of the parties disadvantaged racial minorities in the jury pool.

---

[25] *See Miller-El II*, 545 U.S. at 241.

The Louisiana Supreme Court's opinion affirms and amplifies the double-standard in which the trial court subjected defense counsel's race-neutral explanations to greater scrutiny than the State's. The State lodged a reverse-*Batson* objection when the defense peremptorily struck Juror Jaclyn Burst. At that time, the defense had already accepted ten white jurors. When asked to put his reasons for the strike on the record, defense counsel said:

> [S]he would tend to agree with Mr. Mary while Mr. Mary was speaking. She is a – she identified herself on the questionnaire as a Christian, Republican, which neither one in and of itself is a concern, but I tend to find that people that identify themselves as a generic Christian as opposed to a certain denomination tend to be more conservative. That kind of non-denominational – it's a general feeling that we have, Judge. We feel that based on her demeanor during Mr. Mary's voir dire, tended to be pro State. She

> tended to nod with Mr. Mary and be in agreement with Mr. Mary.

R. 2475. The court carefully scrutinized these reasons, asked to look at Ms. Burst's questionnaire, and said, "the defense has verbalized . . . that she said she was a Christian, Republican on the form, which she did not. That form says that her husband is a Christian, Republican." R. 2476. It then denied the challenge.[26]

The trial court's scrutiny of the defense peremptory stands in stark contrast to its treatment of the State strikes. When providing reasons for the strike against African-American Ms. GeJoan Garrett, the prosecutor said, "she was a volunteer at the Belle Chasse State School." R. 2463. However, Ms. Garrett's questionnaire indicates that someone else in her family volunteered there. The prosecutor thus made the exact same error as defense counsel, attributing the substance of a questionnaire response to the juror rather than a member of the juror's family. Whereas the trial court uncovered defense counsel's error and consulted Ms. Burst's questionnaire, it did not scrutinize the State's strike and did not bother to look at Ms. Garrett's questionnaire: "I think that Ms. Garrett did say that – I don't recall about the questionnaire. I trust that that's on there." R. 2464. The defense strike was prohibited; the State strike was approved.

---

[26] Although the court properly identified defense counsel's error in citing Ms Burst's questionnaire, other rulings show that it was even dismissive of the defense's record-bound reasons. The court apparently disallowed the defense peremptory against Juror Margaret Clawson on reverse-*Batson* grounds. Defense counsel explained that it "struck Ms. Clawson primarily because she has previous jury duty, had found a defendant guilty as charged in a previous jury trial on a theft charge. She's also served on a civil jury." R. 2471. Although Ms. Clawson's questionnaire supported these facially race-neutral reasons, the trial court astonishingly found "[t]hat, as a whole is not a good enough race neutral reason . . . ." *Id.* For unknown reasons, however, the court ultimately dismissed her from service. R. 2483.

The Louisiana Supreme Court endorsed the trial court's differential treatment of the parties, and took the effort a step further. In evaluating the State's strikes, it supplied a reason that the State never offered at trial or on appeal. *See supra* Section I(A) (the court supplied a new reason for the strike against Ms. Frazier). At the same time, in assessing the reverse-*Batson* challenge, the court derided defense counsel for failing to offer obvious reasons for the strike against Ms. Burst: "Defense counsel's articulation regarding Burst was decidedly weak. . . . he neglected to state the one disclosure Burst made, which could possibly have carried the day . . . namely, a family member had been the victim of a home invasion . . . ." App. B at 149A. The Louisiana Supreme Court cited no law to explain why it relied upon reasons that the State had not provided in upholding strikes excluding African-Americans, but simultaneously punished the Petitioner because there existed legitimate reasons the defense had not provided for striking white jurors.

In several instances, Petitioner cited the prosecutor's failure to question prospective jurors about an issue of alleged importance as evidence of pretext. *See Brief on Appeal* at 25 (the State did not ask Mr. Woods any questions about his son); 31-33 (the State did not ask Mr. Ratcliff any questions about his views on rehabilitation and working with at-risk populations); 40 (the State did not ask Ms. Frazier any questions about her arrest); 45 (the State did not ask Ms. Garrett about her views on mental retardation). The Louisiana Supreme Court ignored all of this. The court recognized that a failure to question can be evidence of pretext, but only in the context of the reverse-*Batson* challenge. Although the State did not make the argument, the court pointed out, "the fact [defense] counsel did not bother to voir dire Burst on these matters suggests a discriminatory intent when he later challenged her claiming this was what concerned him about her." App. B at 144A n.28. The Louisiana Supreme Court cited no law to explain why the State's repeated failure to question had no bearing on the legitimacy of its peremptory strikes against African-Americans, but defense counsel's failure to question provided evidence that he discriminated against whites.[27]

---

[27] Although the Louisiana Supreme Court rejected Petitioner's argument that the State strike against Mr. Ratcliff was impermissibly based on gender, it accepted the State's claim that the defense strike against Ms. Burst was impermissibly based on gender. *See* App. B at 149A ("Such an explanation

The Louisiana Supreme Court's treatment of the reverse-*Batson* challenge suggests that it is capable of performing the type of review mandated by *Miller-El II* and *Snyder*. Here, the court chose to provide a meaningful review of the State's claim that the defense discriminated against a white juror, but did not perform a similar review of the defense's claim that the State discriminated against African-Americans. Mr. Dressner was convicted and sentenced to death by a jury comprised of 11 white jurors and one African-American.

---

employing gender-specific language, comes close to pretextual.").

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted, the Louisiana Supreme Court's opinion should be summarily reverse, and the Petitioner should be granted a new trial.

Respectfully submitted,

G. Ben Cohen*
Bidish Sarma

The Capital
Appeals Project
636 Baronne Street
New Orleans, LA 70113
(504) 529-5955
benc@thejusticecenter.org

*Counsel of Record for Petitioner

APPENDIX A

SUPREME COURT OF LOUISIANA

STATE OF LOUISIANA

v.

DUSTIN DRESSNER

08-KA-1366 (La. 07/06/10); 2010 La. LEXIS 1656

June 6, 2010, Decided

PRIOR HISTORY:

ON APPEAL FROM THE TWENTY-FOURTH JUDICIAL DISTRICT COURT, FOR THE PARISH OF JEFFERSON, HONORABLE HANS J. LILJEBERG, JUDGE.

State v. Dressner, 874 So. 2d 845, 2004 La. LEXIS 1857 (La., May 21, 2004)

DISPOSITION: AFFIRMED

COUNSEL: CAPITAL APPEALS PROJECT, G. Benjamin Cohen, Bidish J. Sarma, JONES, WALKER, WAECHTER, POITEVENT, CARRERE & DENEGRE, M. Richard Schroeder, For Appellant.

James D. Caldwell, Attorney General, Paul D. Connick, Jr., District Attorney, Juliet Lee Clark, Terry Michael Boudreaux, Cameron Matthew Mary, Assistant District Attorneys, For Appellee.

JUDGES: KNOLL, JUSTICE.

OPINION BY: KNOLL

OPINION

KNOLL, JUSTICE[*]

On August 1, 2002, a Jefferson Parish grand jury indicted defendant, Dustin Dressner, (also known as "Shorty"[1]), with the June 6, 2002, first-degree murder of Paul Fasullo, a violation of La. Rev. Stat. § 14:30. During his arraignment on August 2, 2002, defendant entered a plea of not guilty. Defendant's jury trial commenced on May 20, 2004.[2] During trial on the merits, the State presented testimony from eleven witnesses before resting its case-in-chief. Thereafter, the defense called two guilt phase witnesses[3] and then rested, concluding the presentation of evidence on May 23, 2004. After hearing closing arguments, receiving the district court's instructions, and deliberating defendant's guilt for two hours, the jury returned a unanimous verdict of guilty of first-degree murder. Trial on the penalty phase began on the morning of May 24, 2004. Following the presentation of evidence, the jury deliberated for eighty minutes before unanimously returning a verdict of death, finding the offense was committed in an especially heinous, atrocious, or cruel manner, and defendant knowingly created a risk of death or great bodily harm to more than one person. The district court denied defendant's motion for new trial on October 21, 2004, and sentenced defendant to death in accordance with the jury's verdict on November 18, 2004.

---

[*] Retired Judge Philip C. Ciaccio, assigned as Justice *ad hoc*, sitting for Chief Justice Catherine D. Kimball.

[1] During closing argument, the prosecutor argued defendant is "all [of] five feet, 112 pounds."

[2] Defendant's trial was initially slated for January 12, 2004. On the morning of trial, defense counsel filed a motion for change of venue based on media attention surrounding co-defendant's recent trial, which the district court denied. Thereafter, defense counsel moved for a continuance of trial based, *inter alia*, on witness problems, which the district court also denied. The defense simultaneously sought writs in the Fifth Circuit and this Court. Jury selection began, and after two days of *Witherspoon* voir dire, yielding eighty-two death-qualified prospective jurors, the Fifth Circuit granted defendant's writ and ordered the case continued, notwithstanding finding "defense counsel's motion for continuance is blatantly dilatory." *State v. Dressner*, 04-0047 (La. App. 5 Cir. 1/13/04). This Court then denied the simultaneously filed writ as moot. *State v.*

Under La. Const. art. V, § 5(D), defendant directly appeals his conviction and death sentence, raising twenty-six assignments of error. We will address the most significant errors in this opinion,

---

Dressner, 04-0132 (La. 1/14/04), 864 So.2d 611. Accordingly, the district court declared a mistrial.

[3] The defense called Ilis Gilbert, defendant's girlfriend at the time of the murder, and her mother, Daphne Gilbert.

and the remaining errors will be addressed in an unpublished appendix. After a thorough review of the law and the evidence, we affirm defendant's first-degree murder conviction and the imposition of the death sentence for the following reasons.

FACTS

The events of that tragic day of June 6, 2002, began with a phone call from Troy Arnaud[4] to defendant requesting a ride to a job interview. Defendant then left his home on 228 Jamie Boulevard in Avondale around 2:00 p.m. and picked up Troy from Billy Rumsfield's house located at 5313 Taffy Street in Marrero around 3:00 p.m. After first stopping by a store to purchase a fifth of vodka, a fifth of gin, and a jug of fruit punch, the two traveled to Westwego to visit a friend of the defendant. When Troy received a page from Kellen Parker, defendant and Troy returned to the Rumsfield house where Parker was waiting.[5] The three then drove around all afternoon, drinking the vodka, gin, and Cisco wine, listening to rap music, and smoking about half of a marijuana cigar or "blunt." During this time, defendant kept up an continuous stream of tough talking, "talking a lot of mess" about "how bad he is" and how "he about whatever."

---

[4] Troy Arnaud was initially indicted for second-degree murder in connection with this case. However, from the outset, he met with the State and indicated he wanted to assist. Pursuant to a plea agreement, Troy pled guilty to the reduced charge of accessory after the fact of first-degree murder in exchange for truthful testimony against both defendant and Kellen Parker. Troy was sentenced to five years with good time eligibility.

[5] While Troy had known Parker since elementary school, defendant and Parker apparently met for the first time that day.

At some point, the trio returned to the Westwego home of defendant's friend to play baseball and later traveled to the apartment complex of defendant's girlfriend, Ilis Gilbert, in Metairie. While defendant entered the apartment, Troy and Parker remained in the car. Some time later, defendant returned visibly upset.[6] The trio next went to retrieve money from the apartment of Amy Rome in Marrero. Rome was Troy's girlfriend at the time. Troy went inside, and defendant followed him to get "something flat" from the kitchen drawer, ostensibly to fix his car stereo amplifier, which had been "messing up" on the ride back across the river. Unknown to Troy, defendant actually took two knives, both of which Rome later identified as coming from her kitchen. After leaving her apartment, they drove to a nearby store, where Troy went inside to buy another bottle of Cisco wine.[7]

---

[6] At trial, Ilis testified defendant broke up with her before leaving her apartment that day because her mother, Daphne Gilbert, who also testified at trial, had called his mother to complain about his behavior in her home.

[7] Troy testified he did not know what was being discussed in the vehicle while he was inside the store making his purchase, but he did notice when he returned Parker had taken his position in the front passenger seat.

According to Troy,[8] defendant then claimed he was going to a friend's house and asked "you-all 'bout whatever." Parker responded, "man, I'm 'bout whatever." Troy testified, while they had been drinking a lot, defendant did not appear so intoxicated he did not know what he was doing. In his statement, defendant explained he went to the victims' house for alcohol, which the victims had previously given him at parties in their home located at 5313 Tulip Court in the Oak Cove subdivision of Westwego.[9] Upon arriving at the victims' house, defendant and Parker proceeded to the front door, while Troy remained in the car.

---

[8] Troy recalled the moments in the car before arriving at the victims' house. In Troy's view, defendant "always talk about what he about, what he going to do." They had the radio on and defendant "be rapping or he be talking towards the rap, and the rap was something like, well, you know, I'm about killing people, I do this and that" and "I ain't scared to die or whatever." Troy further testified, while defendant did say "that he feel like killing somebody," Troy explained "he always talk like that.... That's not the first time that come out his mouth, you following what I'm saying?"

[9] Shannon Fasullo described these parties as weekly, sometimes bi-weekly, during which the participants would partake of certain drugs, including alcohol, marijuana, cocaine, and Ecstacy.

Narcotics agent Eddie Greer testified regarding the narcotics and drug paraphernalia found at the scene:

> Five viles [sic] containing a white, powder residue, later identified as cocaine, three plastic bags, small bags, of marijuana and marijuana seeds; some drug paraphernalia; a razor blade; a mirror; and I [saw] some rolling papers; and I think a little small spoon.

According to Shannon Fasullo, at approximately 10:30 p.m., her husband, Paul Fasullo, and their two-year-old daughter, Samantha, were asleep in their king-size bed when she heard a knock on the door. When she answered the door, she saw a black male and defendant, who is a white male, known to Shannon from visiting her home on previous occasions with her nephew, Michael Fasullo.[10] Commenting upon the fact Michael's car was in the driveway, defendant asked if Michael was there and if he could come inside to buy drugs. Shannon answered no to both questions.[11] When she then turned to go inside and close the door, she felt someone strike her "over the head" with something "like a rock," immediately knocking her down and dislodging her eyeglasses.

The above described items along with a scale were seized from a dresser drawer in the master bedroom. A bamboo pipe was also seized from the desk in the "home office."

[10] According to Shannon, defendant had attended a few parties the victims hosted in their home, but Shannon Fasullo had not seen defendant since approximately three weeks before the night in question. When Shannon last saw defendant, he came to her home and requested entrance, which she refused because she was entertaining friends. The defendant on that occasion left with no cross words or disagreement.

[11] She testified defendant appeared calm and unintoxicated.

Hearing glass break, Troy looked from his vantage point in the car to the doorway and saw defendant holding a broken Cisco wine bottle and Parker "swinging" at Shannon with a knife. Shannon stated the black male attacked her repeatedly while she called for Paul. Finally gaining her feet by using Parker's leg as leverage, Shannon ran towards the bedroom. Troy witnessed Parker running after her.

In her rush to the bedroom, Shannon noticed Paul in the doorway fighting with defendant over a knife.[12] Upon reaching the bedroom, Shannon closed the door, picked her screaming daughter up from the bed, and called 911. She was only able to scream her address before defendant and Parker broke into the room, wielding knives to renew their attack on her. At that point, Shannon put her child down and tossed the cordless phone under her bed, while the 911 call was still engaged. The murderous mayhem was recorded on tape, including Shannon's screams, baby Samantha's frightened cries, and in places, defendant's own voice saying "this bitch won't die."

During the attack in the bedroom, Shannon fell to the ground by the bedside table, under which she partially crawled. Defendant then straddled her and sliced her throat, cutting her three to four times in that area. In fending off defendant's attack, Shannon grabbed his hands, and defendant began bargaining with his victim, promising he would let her go if she let him go. In response, Shannon begged him not to hurt her or her daughter. At some point in this deathly struggle, defendant's watch was pulled off. Thereafter defendant broke loose of Shannon's hold, and the two men succeeded in pulling her from beneath the table. Shannon then climbed on the bed, and the attack continued, as defendant's knife slit Shannon's face open from her "forehead down [her] cheek over [her] left eye" down to her lip, which was gashed in two. Eventually, Shannon was able to get up and lock herself in the bathroom, using her feet pressed to the sink to keep the door closed; however, both defendant and Parker kicked on the door until the frame broke and stabbed Shannon two times in the arm before fleeing the house for fear the police were surely on the way.

---

[12] Shannon described Paul as thin and slightly taller than defendant at "five something-five." Paul was 39 years old on the night of the attack; Shannon was twenty-two.

Moments later, Parker ran from the house with a pink piggy bank under his shirt, and defendant followed with blood covering his chest and his white muscle shirt thrown over his shoulder. Troy testified defendant got into the front passenger seat, pointed a knife at him, and ordered him to "drive, drive, drive." Troy drove them out of the neighborhood, but when two police cars passed them on the road, Troy became frightened and drove the car into a ditch. Initially, all three fled the vehicle running.[13] However, defendant went back for his car.

---

[13] Troy Arnaud testified, when they all broke and ran, Parker dropped the piggy bank in the parking lot of an abandoned business. However, the next morning, Parker went back to the

Defendant claimed Parker tossed the knives from the moving car shortly after exiting the subdivision.

After waiting a few moments, Shannon pushed the bathroom door she had used as a shield off of her and called for her daughter and her husband. Receiving no response, she made several attempts to raise herself from the bathroom floor, but was seized with fits of vomiting as a result of her efforts.

Deputy Robert Pellegrin[14] responded to the dispatch regarding this incident at 5313 Tulip Court. Upon entering the residence, the deputy observed blood and broken glass at the doorway, a crying baby covered in blood, and what appeared to be a deceased body with multiple stab wounds in the hallway. Deputy Pellegrin proceeded to the master bedroom and noticed blood "everywhere," on the bed, the doorway of the bathroom, and on the bedroom floor. He found Deputy Mendez in the bathroom attending to Shannon, who was lying on the floor in a pool of blood and vomit, suffering from more stab wounds than he could count. Fearing Shannon would not "make it," he began to question her and was able to obtain a partial description of the perpetrators, including the fact one was a black male and one was

---

parking lot, gathered the change from the piggy bank, and then used the money to get his hair fixed.

[14] Occasionally, the record spells this deputy's surname "Bellegrin."

a white male, and the name Michael. Deputy Pellegrin then contacted headquarters to request EMS and notified the Detective's Bureau.

EMT, Patrick Theriot, shortly arrived on the scene. He examined Paul lying in a "large, large pool of blood" and detected no vital signs. EMT Theriot then examined the "inconsolable" baby, who had a busted lip and was covered with blood, in an effort to determine if the blood was her own.[15] He was then called to the bathroom, where he found Shannon in a state of shock, asking for her baby and her husband and suffering from over twenty stab wounds to her back, scalp, face, neck, upper body, arms, and legs. The exact number was not determinable at that time as the blood running from one wound to another obscured the various wounds. While removing Shannon's nearly lifeless body from the scene, EMT Theriot noticed a broken, bent knife blade within a few feet of her, which he "made specific, careful attention to stay away from" and brought to the deputy's attention. He then rode with Shannon and Samantha to West Jefferson Medical Center.

Detective David Morales, the case detective, testified upon entering the foyer of the residence he observed a paper bag with some broken glass in it, a bottle neck, and a pair of ladies' eyeglasses. He saw

---

[15] A photograph taken at the scene depicts the child in a t-shirt holding a stuffed monkey with a blood-like substance splattered and smeared across her shirt and on her forehead, nose, chin, hands, legs, and feet.

Paul Fasullo's lifeless body in the hallway, clad only in boxer shorts, and blood on the floor leading to the hallway. He noticed the bathroom door with footprints on it appeared to have been forced open, a man's broken wristwatch, and a silver knife blade. The police forensic team collected the evidence.

At the hospital, Sergeant Dennis Thornton, Detective Morales's supervisor, interviewed Shannon while she received treatment in the emergency room, and, in her first statement, she gave general descriptions of her two attackers and indicated she recognized the white male as someone connected to an individual, who knew her nephew. Based on the interview, officers spoke with her nephew, Michael Fasullo, who gave police the name of defendant's friend, Brandon Sapia, who was also interviewed. Dustin Dressner became a suspect and his photograph was included in a six-person line-up prepared with a print track machine.[16] Both Sergeant Thornton and Detective Morales returned to the hospital where Shannon Fasullo, though still receiving care for the stab wound to her face, positively identified defendant as the white male who attacked her. However, Shannon could not identify her black male attacker because she did not get a good look at him. An arrest warrant for defendant and a search warrant for his residence, 228 Jaime Boulevard, were issued.

---

[16] Detective Morales explained a print track machine is a computer into which one puts a description of a person and the computer then "picks out similar people that look like that person. And the computer actually picks these people out, and you keep doing it ... till you have five people that look like the person of interest. And then, you press another button that randomizes them. What it does, it just switches around, so you have no control where that person is at. The computer picks that out. So then you print it out, and it comes out just like this -- a photograph with six people, including the person of interest."

Early on the morning of June 7, 2002, Sergeant Thornton and Detective Morales went to defendant's house to execute the warrants and were surprised to find him outside, cleaning blood from his car with a bottle of peroxide and a rag. Detective Morales arrested defendant and transported him to the Detective's Bureau, while Sergeant Thorton executed the search warrant and seized defendant's clothes and shoes, which he had already begun to launder. Defendant's car was then towed from the location, and a search warrant for the vehicle was later issued and executed.

Defendant cooperated with police. After the police advised him of his *Miranda*[17] rights, which he waived, defendant admitted he was involved in the home invasion murder and he inflicted the fatal stab wound to Paul Fasullo's chest. He named a black man, whom he knew only as "Kelly," as his partner in crime and also named Troy Arnaud as present in the car. Through some investigative work and the use of computer databases, the detectives came upon the name Kellen Parker and were able to prepare two photographic lineups. Defendant positively identified Troy in the first lineup and Parker in the second lineup. Defendant then assisted the police in identifying relevant addresses, namely Troy's house and Billy Rumfield's house from where defendant picked up both Troy and Parker the day before, and in locating the discarded knife and a second knife handle off of which most of the blade had broken. Arrest warrants were issued for both Troy Arnaud and Kellen Parker, as were search warrants for their known residences. The detectives simultaneously executed the search warrants on the residences and, in an abundance of caution, placed the Rumsfield's residence on Taffy Street under surveillance.

---

[17] *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed 2d 694 (1966).

Troy testified, on the day after the murder, he met up with Parker at the Rumsfield's house on Taffy Street and asked him what had happened the night before. Parker told him "somebody had got hurt." Later that evening, both Troy and Parker were apprehended at the Rumsfield house, when the detectives watching the house saw a black male matching Parker's description on the front lawn and moved on the location. Carol Rumsfield, Billy's mother, turned over clothes she believed were Parker's, which had blood on them, and told the officers Parker had spent the previous night at her house.

Through tool marks and fracture match analysis, the broken blade found on the scene was matched with one hundred percent scientific certainty to the knife handle retrieved by the detectives at defendant's direction. DNA testing revealed Shannon Fasullo could not be excluded as the donor of the blood found on defendant's jeans, on the interior of defendant's car door, or on Parker's shirt. Both Shannon and Paul Fasullo could not be excluded as donors of the blood found on Parker's jeans and shoes, which shoes Det. Morales seized from Parker's person after his arrest. Forensic trace evidence analysis showed the shoe print on the bathroom door was made by Parker's shoe or a shoe with a similar sole pattern.

Dr. Susan Garcia, an expert in the field of forensic pathology, performed an autopsy on the homicide victim, Paul Fasullo, and testified he sustained stab wounds,[18] lacerations,[19] and abrasions[20] primarily to his chest, upper neck, and head area.[21] Only the stab wound to the chest, which was three to four inches deep and five-eights of an inch wide and which entered the chest cavity between the ribs, just left of midline, nicked the left upper lobe of the lung, perforated[22] the pulmonary artery, and penetrated[23] the base of the aorta, was lethal.[24] All the wounds were inflicted concurrently, and no defensive wounds were incurred. The official cause of death was exsanguination resulting from a single stab wound to the chest. According to Dr. Garcia, it is generally accepted a person with such injuries will retain consciousness for three to five minutes only after which time the brain will shut down from lack of oxygen.

---

[18] According to Dr. Garcia, sharp force injuries, like stab wounds, are caused by a sharp object slicing through tissue.

[19] Dr. Garcia explained lacerations result from an object hitting skin and causing it to split. Such wounds are associated with blunt force trauma.

[20] Dr. Garcia described patterned abrasions as being caused by hard contact with an object sufficient to scrape off skin and leave an impression of the object's pattern on the skin.

[21] She cataloged the wounds: (1) single stab wound to left upper chest, twelve inches from the top of his head and one inch to left of his midline (fatal wound), *see infra*; (2) stab wound to right side of neck, five-eights of an inch in length (superficial); (3) two superficial cuts to the right side of his neck, three and two and half inches in length, respectively; (4) patterned abrasion on right cheek measuring three and a half by three

---

and a half inches; (5) abrasion on right ear; (6) three-inch laceration on top of scalp (blunt force trauma); (7) laceration on the side of previously described laceration (blunt force trauma); (8) linear abrasion on right upper chest; and (9) linear scratches to neck.

[22] Dr. Garcia explained perforated means to "go through and through."

[23] According to Dr. Garcia, penetrated means to go "into but not out of."

[24] Although Dr. Garcia's testimony emphasized the fatal insignificance of the remaining wounds, the autopsy photographs admitted into the record depict wounds, which can only be described as gruesome, particularly those to scalp. In fact, from the photographs, the single stab wound to the chest appears rather minor in comparison to the others.

ASSIGNMENTS OF ERROR

Pre-Trial

Although the issues in this section were litigated pretrial, we note at the outset this Court has recognized a ruling denying supervisory writs does not bar consideration of the issue on appeal as denial of supervisory review is merely a decision not to exercise this Court's extraordinary powers of supervisory jurisdiction. *State v. Fontenot,* 550 So.2d 179 (La. 1989). Therefore, the following assignments of error warrant discussion on the merits in this appeal.

Exclusion of Victims' Sexual Misconduct Evidence

Defendant contends in his first assignment of error the district court's exclusion of critical evidence supporting a manslaughter defense and mitigating defendant's culpability deprived him of his right to present a complete defense and his right to confront the State's most important witness, Shannon Fasullo. The issues in this assignment of error arise from the State's Motion in Limine to Exclude Evidence of Alleged Illicit Behavior Between Defendant's Girlfriend and Victims. In anticipation of the defense advancing a manslaughter theory that something sexual provoked defendant into killing the victim, the State on the second day of jury selection moved to preclude the defense from introducing evidence regarding alleged sexual misconduct between the victims, Paul and Shannon Fasullo, and defendant's girlfriend, Ilis Gilbert, stemming from an incident preceding the murder by more than two months. The State also sought to bar the defense from introducing any evidence of narcotics use by the victims as irrelevant. The State argued:

> [I]f they're going to try to play character assassination on the victim, in an attempt to somehow justify or somehow argue for a manslaughter, it's simply not relevant. The allegation that we're concerning ourselves is some alleged groping by the victim, I suppose on this girlfriend of Mr. Dressner's that took place, by her own statement, more than two months prior to the murder. And, one, character evidence of the victim is not admissible in a criminal prosecution, unless and until the defense puts the State on notice that they intend to proceed under a self-defense theory, and then, it's only admissible to go towards an overt hostile act which would then lead to the self-defense. Evidence of drug use and unsubstantiated other crimes or bad acts by the victims are intended for one purpose and one purpose only, that's just to dirty up the victim, and under 404, it's inadmissible. So, I'm moving in limine for an order of this Court to prohibit them from making any reference to these things in opening statement or questioning the witnesses,

> because it's irrelevant and its highly prejudicial.

Thereafter, the district court permitted the defense to put their arguments on the record *ex parte*:

> [Defense counsel]: Judge, the information that we seek to present relative to the drugs, the sex, this is what was going on at this house. This is the contact that my client and his ex-girlfriend had with the victims. I don't intend to sully the victim. These are the true facts of the case. My client was there. He would go there. They would provide him with drugs, alcohol and have these little sexual things that they would do. This is all in statements. This is not something that I'm making up....
>
> The Court: Try to be as specific as you can.
>
> [Defense counsel]: ... Our position is that this incident that happened between Mr. Fasullo and Ms. Gilbert, that's my client's girlfriend, where she indicated that both Mr. Fasullo and Mrs. Fasullo attempted to have sex with her. She was squeezing -- he was squeezing her breasts. Ms. Fasullo was rubbing her between her legs. This is all in her statement. Mr. Fasullo and Dustin got into a small altercation over

that. Okay? He was very, very upset about that.

The Court: When was this?

[Defense counsel]: This happened according to our statement maybe two months prior to and they had been having some bad blood between them. So, you know, this could play into our defense as possibly a reason why he was angry with Mr. Fasullo and engaged into fisticuffs with Mr. Fasullo. All of this stuff goes to our defense here. This stuff is not just to sully anybody's reputation or anything like that. These things [go] to the heart of our defense, the actions that these people engaged in with our clients and the position that my client took relative to some actions by both Mr. and Mrs. Fasullo.

The Court: Okay. Tell me again about the drug use.

[Defense counsel]: Basically they would go over there, and this is in Mrs. Fasullo's statement also. She admits that they would go over and they would provide these people with marijuana, ecstacy. She was taking ecstacy. Mr. Fasullo was taking ecstacy.

The Court: That is generally that they were using drugs.

> [Defense counsel]: Yeah. They would have these teenagers come over and they would have these parties with them. They would provide them with alcohol, drugs and the whole like. You can review her statement. It's in there.

The district court orally granted the State's motion on both issues, reasoning:

> With respect to the drug use, ... it's got no probative value at all and clearly is prejudicial so I'm going to grant the State's Motion in Limine on that issue.
>
> With respect to the manslaughter issue, as I understand the facts there may have been some type of relationship between Mr. Fasullo and the defendant's girlfriend which took place two months prior to Mr. Fasullo's murder. Clearly, I mean if we were talking about a week, maybe even outside of two weeks, then there could be a potential manslaughter defense. In this case clearly two months is far and away enough time for somebody's blood -- for anybody's blood to have cooled so I'm going to grant the State's Motion in Limine on that issue as well.

Significantly, the district court limited its ruling to the guilt phase.

Defense counsel immediately gave notice of his intent to seek writs and a stay "because your ruling impacts the way I may or may not be able to delivery [sic] an opening statement to the jury...." The district court denied the stay, but gave the defense until 1:00 p.m. to file the emergency writ. Counsel informed the court he wished to reserve his right to make an opening statement following the Fifth Circuit's ruling.[25] The defense filed a simultaneous writ application on the same issue in this Court and requested to delay giving opening statement pending resolution of the matter. Accordingly, the district court stayed the trial and sent the jury back to their hotel.

The following day, the Fifth Circuit ruled, granting the defense writ in part, denying it in part, and lifting the stay:

> The evidence of the victims' general drug use is admissible as a defense to the charged crime, as presented in the Defendant's Ex Parte and Under Seal Statement of Facts. Under La.C.E. art. 403, the probative value substantially outweighs its prejudicial effect. Therefore, we reverse the granting of the motion in limine on

---

[25] The State gave its opening statement, and immediately thereafter, the district court stayed the proceedings until 2:00 p.m., so the court of appeal could rule on defendant's writ. The stay extended on, and consequently, the sequestered jury did no other work on this case for the remainder of May 20, 2004.

> that issue. However, the Defendant has failed to show the relevancy of the evidence related to the illicit behavior between the Defendant's girlfriend and victims, or that the probative value of that evidence outweighs its prejudicial effect. See: C.E. art. 403. Therefore, we find the trial judge did not err in granting the motion in limine with regard to this issue.

State v. Dressner, 04-0581 (La. App. 5 Cir. 5/20/04).

This Court denied the stay and denied defendant's writ, ruling: "If defendant is found guility [sic] of first degree murder, the issue of the admissibility of the evidence at the penalty phase of the proceeding may be reurged." *State v. Dressner*, 04-1199 (La. 5/21/04), 874 So.2d 845 (Traylor, J., "would deny the stay and the writ").[26]

A. Right to Present a Defense

The Sixth and Fourteenth Amendments to the United States Constitution and Article I, § 16 of the Louisiana Constitution guarantee the criminally accused a meaningful opportunity to present a complete defense. *State v. Blank*, 04-0204, p. 49 (La. 4/11/07), 955 So.2d 90, 130, *cert. denied*, 552 U.S. 994, 128 S.Ct. 494, 169 L.Ed.2d 346 (2007). Under La. Code Evid. art. 403, relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice...." A district court judge enjoys broad discretion in admitting or excluding evidence on relevancy grounds. *State v. Miles,* 402 So.2d 644, 647 (La. 1981).

---

[26] Justice Victory is not shown as signing.

As a general matter, La. Code Evid. art. 404(A) provides evidence of a "person's character or a trait of his character, such as a moral quality, is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion...." However, an exception to the general inadmissibility of evidence concerning the victim's dangerous character arises under La. Code Crim. Proc. art. 404(A)(2) when there is evidence of a hostile demonstration or an overt act on the part of the victim at the time of the offense. Consequently, evidence of the victim's character is not appropriate, except when the defendant is claiming self-defense against an aggressor victim, which was not the case herein. Paul Fasullo was awakened from sleep only moments before he was stabbed, and significantly, he did not incur any defensive wounds, both of which facts strongly negate aggression on the part of the victim.

In this case, the rulings of the district court, the Fifth Circuit, as well as this Court did not squelch a viable defense.[27] Manslaughter, as it relates to the defendant's theory of the case, is a homicide, which would either be first or second-degree murder, but the offense is committed in sudden passion or heat of blood immediately caused by provocation sufficient to deprive an average person of his cool reflection and self-control. La. Rev. Stat. § 14:31(A)(1). Nothing in the instant record suggests defendant's homicidal actions were the result of immediate "provocation sufficient to deprive an average person of his self-control and cool reflection."

---

[27] It should be noted defendant gave three custodial statements to the police on June 7, 2002, and none of those statements referenced the anticipated defense he was provoked into taking

Additionally, regarding those mitigating circumstances, which reduce the grade of a homicide from murder to manslaughter, the defense had the burden of proof by a preponderance of the evidence. *State v. Lombard*, 486 So.2d 106, 110-11 (La. 1986). Notwithstanding defendant admitted to inflicting the lethal stab wound, the defense failed to demonstrate a sufficient level of provocation stemming from the victims' alleged groping of his girlfriend could have smoldered within defendant for over two months since the event allegedly occurred. As the district court appropriately noted, two months exceeds a reasonable time for a person's temper to have calmed. *State v. Gant*, 06-232, p. 10 (La. App. 5 Cir. 9/26/06), 942 So.2d 1099, 1113 (one week sufficient time for blood to cool), *writ denied*, 06-2529 (La. 5/4/07), 956 So.2d 599; *State v. Crochet*, 96-1666, p. 11 (La. App. 1 Cir. 5/9/97), 693 So.2d 1300, 1307 (two days sufficient time for blood to

---

deadly action because something sexual transpired between the victims and his girlfriend some two months earlier.

cool), *writ denied*, 97-1547 (La. 11/21/97), 703 So. 2d 1305. Under these circumstances, defendant failed to carry his burden of proof such evidence was even relevant much less mitigating. La. Code Evid. arts. 402 & 403. We find no abuse of the district court's discretion in granting the State's motion in limine, and accordingly, the district court did not deprive defendant of his fundamental right to present a defense.

B. Right to Confront Witnesses

Defendant further complains the district court's ruling impinged on his Sixth Amendment right to confront the witness against him, namely, Shannon Fasullo. In defendant's view, trial counsel should have been able to explore "what, if anything, was said that night on the Fasullos' doorstep concerning the subject" and by barring the subject of sexual misconduct, the district court limited the defense's ability to reveal a potential source of Shannon's bias.

"The partiality of a witness is subject to exploration at trial, and is 'always relevant as discrediting the witness and affecting the weight of his testimony.'" *Davis v. Alaska*, 415 U.S. 308, 316, 94 S.Ct. 1105, 1110, 39 L.Ed.2d 347 (1974) (quoting 3A J. Wigmore, *Evidence* § 940, p. 775 (Chadbourn rev. 1970)). In the present case, the jury heard Shannon Fasullo's acknowledgment of how she came to meet defendant.[28] She further related, on the night of the murder when she opened the door and spoke briefly with defendant, his demeanor was calm, and while she could not invite him in because of the late hour, defendant did not appear to be agitated.

Moreover, the defense was given full cross-examination of Shannon Fasullo, and the jury apparently credited her testimony as credible and impartial. Clearly, the singular source of Shannon's bias, if any, against defendant was the fact he stabbed her husband to death and tried with all his might to kill her the same way, and not because she and her husband once engaged in some alleged sexual misconduct with defendant's girlfriend. There was no reason to expose the jury to the speculative allegation something sexual passed between the victims and defendant's girlfriend to demonstrate bias on Shannon's part arising from an alleged sexual encounter two months earlier. Therefore, we find the district court appropriately limited the irrelevant testimony the defense sought to introduce, La. Code Evid. art. 402, and did not deprive defendant of his right to confront Shannon Fasullo. Accordingly, this assignment fails on the merits.

---

[28] As previously noted, at the outset of her guilt phase testimony, Shannon Fasullo acknowledged she and Paul engaged in recreational drug use, weekly, sometimes bi-weekly. She admitted Paul had previously used cocaine, and she had used Ecstasy. She knew defendant "had participated in a couple of parties" at their home.

Exclusion of Evidence of Inconsistent Prosecutions

Defendant complains in his third assignment of error the inconsistent prosecutions advanced in the separate trials of defendant and Kellen Parker and the district court's ruling the defense could not bring these inconsistencies to the jury's attention violated his due process rights and his right to present a complete defense.

In pretrial motions captioned, "Motion to Bar Inherently Unfair Inconsistent Government Theories" and "Motion to Use Prior Government Statements as Evidence," the defense sought "to bar the State from changing its story" and quoted snippets from the prosecutor's rebuttal argument in Kellen Parker's trial. Following a hearing held on May 14, 2004, the district court ruled the motion premature:

> I sat through Mr. Parker's trial and that trial, the entire time, my thinking was that Mr. Dressner was the more culpable of the two; so ... I don't know that it would be necessarily inconsistent -- I mean I think what y'all did in your motions is pluck out a few sentences from the State's attorneys to make it look like Mr. Parker, like they allege that Mr. Parker was more culpable than Mr. Dressner -- which frankly the flavor of the whole week we sat here was not the case, in my opinion....

***

> I sat through that first trial and I don't believe that they, that this will be an inconsistent theory of the case.

The issue resurfaced during the State's penalty phase closing argument. Counsel interrupted when the prosecutor reminded the jurors "[y]ou're here because he [Dustin Dressner] stabbed Paul Fasullo in the chest." Outside the presence of the jury, counsel proffered transcript pages from the State's closing argument in Parker's trial as support for his inconsistent theories motion.

Defendant now claims he should have been able to introduce closing argument made at the penalty phase of Parker's trial, which, in defendant's view, showed the State argued Parker inflicted the fatal stab wound into Paul Fasullo's chest, specifically: "[g]ive [Parker] the same mercy that he showed that little child when he butchered her father [Paul Fasullo] in front of her very eyes." The State's brief counters the prosecutor in Parker's case never told the jury Kellen Parker inflicted the fatal stab wound to Paul Fasullo's chest.

As a general matter, due process forbids a state from employing inconsistent and irreconcilable theories to secure convictions against individuals for the same offenses arising from the same event. *Smith v. Groose,* 205 F.3d 1045, 1048-49 (8th Cir. 2000)(convictions of accomplices in a murder/robbery were obtained at separate trials through diametrically opposed testimony from a third participant; such manipulation of evidence rendered trial fundamentally unfair and required reversal), *cert. denied*, 531 U.S. 985, 121 S. Ct. 441, 148 L. Ed. 2d 446 (2000); compare *Nichols v. Scott,* 69 F.3d 1255, 1268-72 (5th Cir. 1995)(guilty plea of one co-defendant does not preclude murder prosecution of the other when it could not be determined whose gun caused the fatal wound), *cert. denied*, 518 U.S. 1022, 116 S. Ct. 2559, 135 L. Ed. 2d 1076 (1996).

This Court has previously acknowledged "'[in] a situation [where] the prosecutor has adopted such a fundamentally inconsistent position in the separate trials of two co-perpetrators ... basic fairness might require the trial court to permit the exposure of the inconsistent positions.'" *State v. Lavalais,* 95-0320, p. 13 (La. 11/25/96), 685 So.2d 1048, 1056 (quoting *State v. Wingo,* 457 So.2d 1159, 1166 (La. 1984)), *cert. denied*, 522 U.S. 825, 118 S. Ct. 85, 139 L. Ed. 2d 42 (1997). Accordingly, "when no new significant evidence comes to light a prosecutor cannot, in order to convict two defendants at separate trials, offer inconsistent theories and facts regarding the same crime." *Thompson v. Calderon,* 120 F.3d 1045, 1058 (9th Cir. 1997). However, in both *Wingo* and *Lavalais,* this Court distinguished between the state's adoption of mutually exclusive theories of guilt in successive trials of co-defendants and the state's "emphasis on the facts relating to culpability of the particular defendant on trial." *Wingo,* 457 So.2d at 1166. In the latter case, a due process violation does not occur when "[e]ach defendant had attempted to shift culpability to the other, and the prosecutor in each case simply pointed out to the jury the evidence reflecting on the culpability of the defendant on trial and the reasonable inferences drawn from the evidence." *Id.*

In support of his argument, defendant cites the United States Supreme Court's recent decision in *Bradshaw v. Stumpf,* 545 U.S. 175, 125 S.Ct. 2398, 162 L.Ed.2d 143 (2005). However, the Supreme Court's reasoning with respect to principals to capital murder aligns precisely with this Court's holding in *State v. Anthony,* 98-0406, pp. 11-14 (La. 4/11/00), 776 So.2d 376, 385-87,[29] in which this Court held the state is not required to show defendant actually pulled the trigger in order to sentence him to death in a first-degree murder prosecution. *Id.* Instead, to carry its burden of proof successfully, the state must prove defendant acted in concert with his co-perpetrators, defendant had the specific intent to kill, and one of the aggravating elements enumerated in the first-degree murder statute was present. *Id.*

Notwithstanding defendant's argument to the contrary, nothing in the statements reproduced, *supra*, demonstrates inconsistent theories of the prosecution. The testimony and evidence supported both defendant and Kellen Parker were armed with knives and both actively participated in the savage attack on Paul and Shannon Fasullo. Defendant admitted in his statement he stabbed Paul Fasullo in the chest. Dr. Garcia testified the only fatal wound Paul Fasullo suffered was the stab wound to the chest; however, she did note Paul Fasullo concurrently sustained other non-lethal stab wounds to the neck and blunt force injuries splitting his head, the source of which could not be determined. In addition, based on the testimony of the living victim, Shannon Fasullo, the jury learned both defendants were wielding their knives repeatedly in attacking her. Nothing in the prosecutor's argument in Kellen Parker's trial exonerated or exculpated defendant, as the two were principals to the same crimes. There is nothing "inherently irreconcilable" about arguing each perpetrator's specific intent in his separate trial. *State v. Scott*, 04-1312, pp. 81-83 (La. 1/19/06), 921 So.2d 904, 957-58[30] (distinguishing between the state's adoption of mutually exclusive theories of guilt in successive trials of co-defendants and the state's emphasis on the facts relating to the culpability of the particular defendant on trial); *see also State v. Holmes,* 06-2988 (La. 12/2/08), 5 So.3d 42 (rejecting same due process claim the state presented alternate theory of the crime at capital trial of her co-defendant), *cert. denied,* U.S. , 130 S.Ct. 70, 175 L.Ed.2d 233 (2009). Therefore, we find defendant fails to demonstrate inconsistent theories of prosecution and find no merit to defendant's argument.

---

[29] Certiorari denied by *Anthony v. Louisiana,* 531 U.S. 934, 121 S.Ct. 320, 148 L.Ed.2d 258 (2000).

---

[30] Overruled on other grounds by *State v. Dunn,* 07-0878 (La. 1/25/08), 974 So.2d 658.

Exclusion of Evidence of Defendant's Diminished Capacity

In his fourth assigned error, defendant argues the district court's refusal to allow defendant to introduce evidence that his diminished capacity negated the voluntariness of his confession denied him the right to present a complete defense during the guilt phase of trial.

At the outset of this discussion, we note the most contentious pretrial issue was the State's pursuit of defendant's school and mental health records and the defense's efforts to prevent the State from succeeding, even as the defense advanced the notion of defendant's diminished capacity at every opportunity, notwithstanding defendant had not entered a dual plea of not guilty and not guilty by reason of insanity. As early as February 23, 2003, the State anticipated the defense theory and so issued three subpoenas duces tecum for records from Jefferson Parish School Board, Depaul's Hospital, and Methodist Behavioral Resources. Immediately, defense counsel questioned whether the State was entitled to these records. Ultimately, the district court issued the State's subpoenas, and the records were produced under seal. As trial approached, the State argued for review of the records with persistent claims of defense "sandbagging." The district court acknowledged the State's frustration and agreed "that appears to be what's happening."

At a status conference held on May 7, 2004, the defense filed a written "Notice of Defense Based Upon Mental Condition Pursuant to La.C.Cr.P. art.

726 A," indicating its intent to raise defendant's mental condition as a defense. In his filing, defendant contended he should be entitled to introduce testimony relating to a mental disease, defect or other condition bearing upon the issue of whether he had the specific intent required for the offense charged, despite the fact he had not entered a dual plea of not guilty and not guilty by reason of insanity. The State objected to defendant's notice, arguing the defendant was prohibited by law from claiming such a defense unless he entered the dual plea of not guilty and not guilty by reason of insanity. See La. Code Crim. Proc. art. 651. Defense counsel then put all on notice the defense position was La. Code Crim. Proc. art. 651 was unconstitutional. Consequently, the district court issued an order for the defense to turn over all records relied upon by its mental health expert, Dr. Justin Wiley, by 12:00 p.m. on the following day, May 8, 2004. The Fifth Circuit vacated the district court's ruling, but further ordered the defense to supplement its writ application to comply with the Uniform Rules, Court of Appeal, Rule 4-5, no later than 10:00 a.m. on May 10, 2004. *State v. Dressner*, 04-0519 (La. App. 5 Cir. 5/7/04).

Then, on May 10, 2004, the district court held a hearing on the subject and again ordered the documents, previously sealed, to be unsealed and released to the State because the defense is "opening the door to all of the documents." The defense again sought writs. Consequently, the district court stayed its order pending resolution of defendant's writ to the court of appeal.

Simultaneously, the district court issued a written order on the subject of defendant's request to admit evidence of diminished capacity at the guilt phase of his trial. Noting the defense had not served the Louisiana Attorney General with his threatened constitutional challenge to La. Code Crim. Proc. art. 651, the district court denied defendant's request as premature.

The Fifth Circuit granted defendant's writ with the following order:

> Considering the trial court's May 10, 2004 ruling denying the defendant's request to admit evidence of the defendant's diminished capacity at the guilt phase of the trial, no basis exists for the document production ordered by the trial court on May 7, 2004. Accordingly, we grant the relator's writ application and vacate the trial court's order.

State v. Dressner, 04-0519 (La. App. 5 Cir. 5/10/04). The State sought review in this Court, which a majority of the Court denied, but three justices would have granted:

> Writ denied. In the event that the defendant is found guilty of first degree murder, the state may re-raise prior to the penalty phase the issue whether the defense must provide discovery of documents regarding the defendant's mental health.

> VICTORY, J., would grant the writ.
>
> KNOLL, J., would grant the writ for the reasons assigned by WEIMER, J.
>
> WEIMER, J., would grant the writ. There is no showing that the trial court abused its great discretion. We must yield to the trial court's decision that the defendant, who has repeatedly put his allegedly diminished mental capacity at issue, must provide the State with materials his proposed expert witness has reviewed.

State v. Dressner, 04-1158 (La. 5/14/04), 874 So.2d 157.

At the May 14, 2004 status conference, the defense acknowledged it served the Attorney General's Office with its constitutional challenge. The State informed the court the AG's Office did not intend to respond to the defense's challenge. Accordingly, the district court clarified the defense would be precluded from raising the issue of mental condition at the guilt phase. The State reiterated it would again seek production of the sealed documents in the event of a penalty phase, when the issue could resurface.

During a status hearing on May 17, 2004, the defense indicated it might bring in the issue of diminished capacity at the guilt phase in conjunction with the voluntariness of defendant's confession and might introduce evidence surrounding the taking of that confession in which defendant's mental state could pertain. The State again sought review in this Court of the Fifth Circuit's decision, and this Court denied the stay and denied the writ. *State v. Dressner,* 04-1202 (La. 5/21/04), 874 So. 2d 845 (Traylor and Knoll, J.J., would grant the writ).

Before opening statements in the guilt phase, the parties argued defendant's motion for admission of evidence concerning the circumstances surrounding the making of his statements to the police. The district court ruled:

> The court has previously ruled that evidence of the defendant's mental condition in the guilt phase of the trial is not admissible since the defendant did not plead not guilty by reason of insanity....
>
> ***
>
> In addition, I will note that having sat through ... basically the facts in this case against State versus Kellen Parker I'm really not sure how much weight the statement -- the defendant's statement has to present. There's plenty of evidence outside of the statement that goes to the defendant's guilt in proving DNA and so on and so forth if my memory serves. So, for all of those reasons the court is going [to] deny the defendant's motion.

The district court failed to see any prejudice to defendant by the ruling in the face of "the total overwhelming evidence of the defendant's guilt outside of the confession." Thereafter, the district court issued its written "Order and Reasons":

> This Court denies defendant's motion pursuant to the Fifth Circuit's reasoning set forth in *State v. Hayes,* 806 So.2d 816, 825-26 (La. App. 5 Cir. 12/26/01). In *Hayes*, just as [in] this case, the trial court had denied the defendant's motion to suppress his confession. The defendant then attempted to introduce the testimony of Dr. Salcedo regarding the defendant's diminished capacity to show the alleged involuntary nature of the defendant's statement. The Fifth Circuit upheld the trial court's decision to exclude Dr. Salcedo's testimony.

Nevertheless, at the penalty phase, the jury heard from two defense expert witnesses, who testified defendant suffered from bipolar disorder, Attention Deficit Hyperactivity Disorder (ADHD), and polysubstance abuse disorder.

A. Prejudice to the Defense.

It is well-settled, "[w]hen a defendant is tried upon a plea of 'not guilty', evidence of insanity or mental defect at the time of the offense shall not be admissible." La. Code Crim. Proc. art. 651; *State v. Holmes,* 06-2988, p. 46 (La. 12/2/08), 5 So.3d 42, 74, *cert. denied,* U.S. , 130 S.Ct. 70, 175 L.Ed.2d 233 (2009). Under La. Rev. Stat. § 14:14, Louisiana's codification of the *M'Naughten* Rule,[31] an offender is exempt from criminal responsibility only if he is incapable of distinguishing between right and wrong with reference to the conduct in question. Thus, Louisiana does not recognize the doctrine of diminished capacity absent a dual plea of not guilty and not guilty by reason of insanity. *State v. Deboue,* 552 So.2d 355, 366 (La. 1989), *cert. denied,* 498 U.S. 881, 111 S. Ct. 215, 112 L. Ed. 2d 174 (1990); *State v. Nelson,* 459 So.2d 510, 513 (La. 1984), *cert. denied,* 471 U.S. 1030, 105 S. Ct. 2050, 85 L.Ed.2d 322 (1985); *State v. Lecompte,* 371 So. 2d 239, 243 (La. 1978). Evidence of a mental defect, which does not meet the *M'Naughten* definition of insanity, therefore, cannot negate a specific intent to commit a crime and reduce the degree of the offense. *Holmes,* 06-2988 at p. 46, 5 So.3d at 74. Consequently, in crimes requiring specific intent, diminished mental capacity is not a recognized defense. *Lecompte,* 371 So.2d at 243.

B. Introduction of Error into the Sentencing Determination

La. Code Crim. Proc. art. 703(G) expressly provides, when "a ruling on a motion to suppress a confession or statement is adverse to the defendant, the state shall be required, prior to presenting the confession or statement to the jury, to introduce evidence concerning the circumstances surrounding the making of the confession or statement for the purpose of enabling the jury to determine the weight to be given the confession or statement." See *State v. Van Winkle,* 93-0843, p. 22 (La. App. 5 Cir. 3/16/94), 635 So. 2d 1177, 1190 ("The predicate [for assessing the evidentiary weight of a statement] should not provide another opportunity to attack the admissibility of the statement."), rev'd 94-0947, p. 8 (La. 6/30/95), 658 So.2d 198, 203 ("Ms. Van Winkle argues the District Court erred in prohibiting her from presenting evidence as to her mental state when she gave the various statements.... [I]f ... the statements are used, then the defendant is entitled to introduce 'evidence concerning the circumstances surrounding the making of the confession or statement for the purpose of enabling the jury to determine the weight to be given to the confession or statement.'")(quoting La. Code Crim. Proc. art. 703(G)). See *Crane v. Kentucky,* 476 U.S. 683, 689, 106 S.Ct. 2142, 2146, 90 L.Ed.2d 636 (1986)("[R]egardless of whether the defendant marshaled the same evidence earlier in support of an unsuccessful motion to suppress, and entirely independent of any question of voluntariness, a defendant's case may stand or fall on his ability to convince the jury that the manner in which the confession was obtained casts doubt on its credibility."); see also *State v. Williams,* 01-1650, p. 8 (La. 11/1/02), 831 So.2d 835, 843[32] (Statutory rule of La. Code Crim. Proc. art. 703(A), which permits the defendant to introduce evidence at trial regarding the circumstances surrounding his confession, "has its underpinnings in the Due Process Clause and it necessarily operates independently of any credibility determinations the trial court may have made in ruling on the voluntariness of a statement as a matter of law.")(citing *Crane v. Kentucky*, 476 U.S. 683, 689, 106 S.Ct. 2142, 2146, 90 L.Ed.2d 636 (1986)).

---

[31] *M'Naughten's Case,* 1 Car. & K. 130 (1843).

---

[32] Superseded by statute on other grounds as stated in *State v. Turner,* 05-2425 (La. 7/10/06), 936 So.2d 89.

However, in *Holmes*, this Court clearly held the erroneous exclusion of evidence of diminished capacity, which may vitiate the voluntariness of the defendant's confession, is nevertheless subject to the harmless error standard of review. *Holmes*, 06-2988 at 48, 5 So.3d at 76. Employing that standard in the present case, a review of the record demonstrates the State presented overwhelming evidence of defendant's guilt, including the testimony of Troy Arnaud, who told the jury about defendant's planning before these crimes and how defendant obtained the two knives to fulfill his purpose from the apartment of Troy's female companion; the testimony of Shannon Fasullo, who told the jury she saw defendant struggling with her husband over a knife and then, along with the help of Kellen Parker, turned his deadly knife attack toward her; Shannon's positive identification of defendant as one of the perpetrators; and her identification of defendant's voice on the 911 tape as saying, "this bitch won't die." Further incriminating was the discovery of Shannon's blood on defendant's clothing and in his car. Finally, unless defendant had been in a hypomanic state or drug induced psychosis at the time he confessed (and there was no evidence of either condition at the time), his mental disorders were not such they would have precluded him from giving a knowing and voluntary statement.

Under these circumstances, even assuming the district court should have admitted evidence of defendant's mental deficiency to help explain "why someone in his state of diminished mental capacity would be more likely to provide detectives with an involuntary or unreliable statement than the average person who is being interrogated by the police," we find exclusion of the evidence was harmless, and these arguments fail on the merits.

Penalty Phase

Heinous, Atrocious, and Cruel Aggravating Circumstances

In his fourteenth assignment of error, defendant suggests the record does not support the finding of the heinous, atrocious, and cruel aggravating circumstance, and thus, defendant asks his death penalty be reversed.[33]

---

[33] Before trial, defendant moved to strike the aggravating circumstance of heinousness. At a hearing on December 12, 2003, the district court took up the matter and, after hearing argument, denied defendant's motion announcing "I have sat through the co[-]defendant's case, and I had trouble sleeping that week. I thought this crime was particularly heinous. So, I'm going to deny the motion."

For a crime to have been committed in an especially heinous or cruel manner, the evidence must support a finding of torture or pitiless infliction of unnecessary pain. *State v. Hoffman*, 98-3118, pp. 33-34 (La. 4/11/00), 768 So.2d 542, 574;[34] *State v. Hamilton*, 92-1919, pp. 14-15 (La. 9/5/96), 681 So.2d 1217, 1226, *cert. denied*, 520 U.S. 1216, 117 S. Ct. 1705, 137 L. Ed. 2d 830 (1997); *State v. Eaton*, 524 So.2d 1194, 1211 (La. 1988), *cert. denied*, 488 U.S. 1019, 109 S. Ct. 816, 102 L. Ed. 2d 807(1989); *State v. Brogdon*, 457 So.2d 616, 630 (La. 1984), *cert. denied*, 471 U.S. 1111, 105 S. Ct. 2345, 85 L. Ed. 2d 862 (1985). To support a finding of heinousness, this Court has also held the murder must be one in which the death was particularly painful and one carried out in an inhuman manner, so that the victim experienced great pain and was aware of his impending death. *State v. Castleberry*, 98-1388, p. 31 (La. 4/13/99), 758 So.2d 749, 774 (finding heinous nature of crime supported "given that defendant forced the victim to look at him before beating him about the head with an iron skillet with such force that the skillet broke and then, finding the victim still alive, smothered him to death, all while the victim was bound and gagged"), *cert. denied*, 528 U.S. 893, 120 S.Ct. 220, 145 L.Ed.2d 185 (1999);

On or about March 8, 2004, the defense filed a second motion requesting the district court reconsider its motion to strike heinousness as an aggravating factor. The district court again denied the motion on March 31, 2004.

[34] Opinion supplemented by *State v. Hoffman*, 00-1609 (La. 6/14/00), 768 So.2d 592, and certiorari denied by *Hoffman v. Louisiana*, 531 U.S. 946, 121 S.Ct. 345, 148 L.Ed.2d 277 (2000).

Eaton, 524 So.2d at 1211. This Court considers awareness of impending doom relevant in a finding of heinousness. *State v. Weary*, 03-3067, pp. 24-25 (La. 4/24/06), 931 So. 2d 297, 314 (sufficient evidence of heinousness for victim of continuous vicious beatings as he was driven from place to place; witness testified victim attempted to escape and victim moaned throughout ordeal before ultimately succumbing to injuries incurred when defendant ran over the victim with his own car), *cert. denied*, 549 U.S. 1062, 127 S. Ct. 682, 166 L. Ed. 2d 531 (2006); *State v. Manning*, 03-1982, pp. 70-72 (La. 10/19/04), 885 So.2d 1044, 1104-05 ("Cases involving stabbings in which this Court has determined that the offense had been committed in an especially heinous and cruel manner share the common theme that the victim died slowly."), *cert. denied*, 544 U.S. 967, 125 S.Ct. 1745, 161 L.Ed.2d 612 (2005).

In the present case, the district court instructed the jurors with the following limiting instruction: "To find that an offense was committed in an especially heinous, atrocious or cruel manner, Louisiana jurisprudence holds that there must be evidence [from which you can find beyond a reasonable doubt there was] torture or the pitiless infliction of unnecessary pain and suffering" on the victim.[35] Using this guidance, the jurors were able to rely upon their common sense and life experiences to assess the pain Paul and Shannon Fasullo[36] experienced as they were stabbed repeatedly by defendant and Kellen Parker.[37] The district court's limiting instruction met the strictures of *Maynard v. Cartwright,* 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988), and the jury was educated on the narrow construction given to the terms "heinous, atrocious or cruel manner."

---

[35] A similarly worded limiting instruction was given in *Manning*, in which this Court upheld the jury's verdict of death based on aggravating factors, including heinousness. *Id.*, 03-1982 at p. 71, 885 So.2d at 1105.

---

[36] Appellate counsel seeks to distance defendant from any participation in the attack on Shannon Fasullo, who survived multiple stab wounds and lacerations. Counsel erroneously adopts defendant's self-serving statement in which he took responsibility solely for the fatal stab wound to the chest of victim, Paul Fasullo. However, the testimony of Shannon Fasullo left no doubt defendant wielded the knife that slashed Shannon's face from her forehead through her left eye and down to her lip, which was gashed in two. Defendant tried to slit her neck three or four times as he straddled her while she lay on the ground trying to fend off his attacks. Accordingly, appellate counsel's notion Kellen Parker was solely accountable for the wounds suffered by Shannon is not supported by the record.

Importantly, La. Code Crim. Proc. art. 905.4(A)(7) speaks of "[t]he offense ... committed in an especially heinous, atrocious or cruel manner," and in this case, the offense was perpetrated upon two victims: Paul and Shannon Fasullo. The fact Shannon survived should have no effect on evaluating the entirety of defendant's actions, as presented by the State, which were sufficient to merit the jury's return of the heinousness aggravator.

Additionally, in the guilt phase, the State advanced their theory of the case defendant committed the first-degree murder during the late night home invasion of Paul and Shannon Fasullo and notified the jury the offense occurred during the perpetration or attempted perpetration of an armed robbery or aggravated burglary. La. Rev. Stat. § 14:30(A)(1). The State also argued defendant had the specific intent to kill or inflict great bodily harm upon more than one person. La. Rev. Stat. § 14:30(A)(4). Following the guilt phase, the judge charged the jury on these two definitions of first-degree murder. The jury returned the general verdict of guilty as charged of first-degree murder.

To assess the sufficiency of the State's evidence in support of the aggravating circumstance of heinousness, the jury was guided by the testimony of Dr. Susan Garcia, the forensic pathologist, who conducted the autopsy on Paul Fasullo. Dr. Garcia opined Paul died of a single stab wound to the chest, which hit the lung, pulmonary artery, and the aorta. She noted Paul incurred numerous non-lethal injuries, including a stab wound to the neck, which was not life-threatening because it did not hit the jugular vein. Additionally, the massive head injuries, which appeared to split the victim's head open, were the result of blunt force trauma, and in the doctor's opinion, those injuries "look worse than they really

---

Consequently, appellate counsel cannot truthfully suggest defendant's actions toward Shannon Fasullo, even as Paul Fasullo lay dying from blood loss, did not represent "torture of the victim or the pitiless infliction of unnecessary pain." *State v. Wille,* 559 So. 2d 1321, 1336 (La. 1990).

[37] This Court once reflected, "Any normal human being will experience his share of childhood scrapes, razor nicks, blood test pricks and various other episodes producing practical knowledge of blood coagulation.... and [could] employ this type of practical knowledge in his deliberations...." *State v. Graham,* 422 So.2d 123, 132 (La. 1982). The same would surely hold true for evaluating the pain caused by such cutting injuries.

are." The jury had the benefit of photographic evidence depicting Paul's injuries, both at the scene and during autopsy. Dr. Garcia concluded Paul's death was not an instantaneous one and it probably took anywhere from three to five minutes for him to lose consciousness.

Additionally, the jurors also learned this attack was so forceful the blade of one of the knives broke away from its handle during the melee and was discovered by EMT Theriot when he removed Shannon Fasullo's nearly lifeless body from the scene. EMT Theriot described Shannon lying on the floor "completely covered with wounds" and with blood all over her. He assessed she was already going into shock because she had vomited on the bathroom floor, one of the initial indicators of shock. Similarly, Deputy Pellegrin testified, from his observations, the female was not in good shape and he thought she would die. Shannon was having trouble breathing and had incurred more stab wounds than he could count. The jury also viewed photographic evidence of the injuries defendant inflicted on victim, Shannon Fasullo.

Further exacerbating the cruelty and brazenness of defendant's attack is the fact he knowingly killed Paul and nearly killed Shannon in front of their two-year-old baby, Samantha. First responders described the child as covered in her parents' blood, crying uncontrollably. The jury saw pictures of baby Samantha, capturing for all posterity the obviously frightened and despondent look on her face.

Perhaps the most horrific piece of evidence the State presented to underscore the heinousness of defendant's crime was the tape of the 911 call Shannon was able to make while the killers were focusing their murderous attention on Paul. Shannon fortuitously threw the cordless phone under the bed as the killers turned their knives and attention toward her. From that point on, 911 recorded the pain and agony of the knife attack defendant orchestrated, which the jury could hear in blood-curdling clarity. Shannon's screams and her pleas of "why are you doing this" and "please don't kill my baby" can all be deciphered from the tape, along with Samantha's terrified wails.

The State's rebuttal argument at the penalty phase drove home the prosecution's theme of heinousness:

> [O]ne of the aggravating circumstances is that this was perpetrated in a cruel, heinous, or atrocious manner....
>
> Dr. Garcia told you-all that Paul would have been conscious for at least three minutes after receiving the [mortal] stab wound. I have my watch set to three minutes, and let's listen to what Paul heard in the last three minutes of his life.
>
> (Playing 9-1-1 audiotape in open court.) Three minutes. A lot can happen in three minutes. Paul had to listen to

> the tortured screams of his wife, the unconsolable [wailing] of his daughter, and he's unable to help. He had to sit there helpless, helpless to come to the aid of the two people he loved most in life.
>
> ***
>
> Paul had a bare minimum, three minutes. In addition to hearing what he heard, what was he thinking? He'll never get to see Sam make her First Communion or Confirmation, her first date. He won't get to say, yes, to the boy that captures her heart when he comes to ask for her hand. He won't get to walk her down the aisle. He won't get to hold his grandchildren. And he won't get to grow old.
>
> Why? And for what? We know the how, and I think you know what to do. Go in there, search your souls, and I think you already know that Dustin Dressner deserves to die.

The facts of this case are not unlike others in which this Court has found no error in the jury's determination the offense was committed in an especially heinous, atrocious, or cruel manner. See *State v. Anderson,* 06-2987, pp. 45-52 (La. 9/9/08), 996 So.2d 973, 1006-10 (eighty-five-year-old female sustained ten major stab wounds, left on her kitchen floor to watch defendant steal valuables from her home as life oozed from her), *cert. denied*, U.S. ,129 S.Ct. 1906, 173 L.Ed.2d 1057 (2009); *Manning*, 03-1982 at pp. 68-72, 885 So.2d at 1103-06 (finding heinousness where defendant abducted sixty-two-year-old victim and forced her to drive him seventeen miles to a remote spot where he severely beat her about the face and chest before slashing her neck, severing her airway; estimated twenty to sixty minutes to die); *State v. Legrand*, 02-1462 (La. 12/3/03), 864 So. 2d 89 (victim stabbed over twenty-five times with a variety of weapons), *cert. denied*, 544 U.S. 947, 125 S.Ct. 1692, 161 L.Ed.2d 523 (2005); *State v. Rault*, 445 So.2d 1203, 1219 (La. 1984)(victim raped, strangled, stabbed in the neck, and shot twice; specifically noting victim's intense mental, as well as physical, pain during the ordeal), *cert. denied*, 469 U.S. 873, 105 S. Ct. 225, 83 L. Ed. 2d 154 (1984); *State v. Flowers*, 441 So.2d 707, 718 (La. 1983)(seventy-year-old widow severely beaten, raped and strangled in her home), *cert. denied*, 466 U.S. 945, 104 S. Ct. 1931, 80 L. Ed. 2d 476 (1984); *State v. Willie*, 436 So.2d 553, 556-57 (La. 1983)(victim taken blindfolded and naked to a remote area where she was tied spread eagle, raped, and had her throat repeatedly slashed), *cert. denied*, 465 U.S. 1051, 104 S. Ct. 1327, 79 L.Ed.2d 723 (1983); *State v. Taylor*, 422 So.2d 109, 117-18 (La. 1982)(victim stabbed over twenty times; slow manner of death), *cert. denied*, 460 U.S. 1103, 103 S. Ct. 1803, 76 L. Ed. 2d 367 (1983); *State v. Moore*, 414 So.2d 340, 348 (La. 1982)(victim received thirteen stab wounds and died slowly "with awareness of her impending death" in presence of four-month-old daughter), *cert. denied*, 463 U.S.

1214, 103 S. Ct. 3553, 77 L. Ed. 2d 1399 (1983). Accordingly, we find the evidence sufficient for a rational juror to find beyond a reasonable doubt the defendant subjected Paul Fasullo to the pitiless infliction of unnecessary pain prior to death. We further find the serious physical, mental, and emotional abuse, which Paul Fasullo had to have suffered moments before death, amounts to torture under our law and defendant carried out Paul's death in a particularly inhumane manner. Consequently, the aggravating circumstance of heinousness is more than sufficiently supported by the record evidence. This assignment of error lacks merit.

Specific Intent to Kill More than One Person

In his eighteenth assignment of error, defendant asserts the State presented insufficient evidence of specific intent to kill more than one person.

La. Code Crim. Proc. art. 905.4(A)(4) authorizes capital punishment in cases in which the offender knowingly created a risk of death or great bodily harm to more than one person. In his statement, defendant confessed to inflicting the lethal stab wound ending Paul Fasullo's life, but he claimed intoxicated memory loss when it came to the multiple stab wounds inflicted upon Shannon Fasullo.

However, the instant record is replete with evidence defendant knowingly created a risk of death or great bodily injury to more than one person, as demonstrated by his elaborate advanced planning. First, defendant recruited co-defendant, Kellen Parker, to assist in the Fasullo home invasion because he knew two adults would be present at 5313 Tulip Court. Earlier that day, defendant took not one, but two knives from Amy Rome's kitchen drawer, so he could arm not only himself, but also arm his confederate. Finally, and most telling, the 911 tape includes defendant shouting, "help me kill this bitch, this bitch won't die, the police are on the way," suggesting he was having trouble fulfilling his mission as to Shannon Fasullo. The fact defendant succeeded in killing only one of his victims does not render the evidence in support of La. Code Crim. Proc. art. 905.4(A)(4) any less sufficient. We find the aggravating circumstance defendant knowingly created a risk of death or great bodily harm to both Paul and Shannon Fasullo is thoroughly supported by the record, and this argument as well fails on the merits.

CAPITAL SENTENCE REVIEW

Under La. Code Crim. Proc. art. 905.9 and La.S.Ct.R. XXVIII, this Court reviews every sentence of death imposed by a Louisiana court to determine if it is constitutionally excessive. In making this determination, the Court considers whether the jury imposed the sentence under the influence of passion, prejudice, or other arbitrary factors; whether the evidence supports the jury's findings with respect to a statutory aggravating circumstance; and whether the sentence is disproportionate, considering both the offense and the offender.

The Department of Public Safety and Correction submitted a Capital Sentence Investigation Report ("CSIR"). *See* La.S.Ct.R. XXVIII § 3(b). In addition, the district court judge filed the Uniform Capital Sentence Report ("UCSR") required by La.S.Ct.R. XXVIII § 3(a). The State and the defense each filed a Sentence Review Memorandum.

Family. Those documents, along with the penalty phase testimony of defendant's relatives, indicate defendant is a Caucasian male, born on November 30, 1983, in Marrero, Louisiana, to the marital union of Allan E. and Shirlene Dressner.[38] The Dressners were married in 1981. Defendant has one brother, Allan M. Dressner, who is eighteen months older than defendant. Both of his parents testified defendant was born blue, indicating oxygen deprivation at birth, and had to spend the first three days of his life in neo-natal ICU.[39] His father described him as a sensitive child growing up, but his problems with other children began in elementary school when kids would pick on defendant because of his small size.

---

[38] At the time of trial, defendant's father had been employed by Delta Airlines as a baggage handler at Armstrong International Airport for twenty-six years. Mrs. Dressner has worked as a baby-sitter for family members and as a stock clerk at Winn Dixie.

[39] Dr. Wiley referred to defendant's birth as anoxic, meaning a shortage of oxygen to the brain, resulting in a primitive brain, like a "monkey" or "caveman," capable of fight or flight. Dr.

Defendant's brother described a normal, middle-class childhood: he and defendant rode bikes after school, both played ball for Westwego Warriors baseball team, and they built a tree house. Allan described his brother as being very athletic and helpful around the house.

Education. Defendant attended Westwego Elementary School followed by Worley Junior High School. According to his brother, around the age of thirteen, defendant started hanging out with the "worst people in school." Defendant dropped out of school in the ninth grade, and his brother recalled defendant was a below average "D" student.

Mental. During his penalty phase testimony, defendant's brother, Allan, described the childhood he and defendant enjoyed as "pretty normal" and their parents did not deny them anything. Yet, Allan perceived a change in his brother when he started hanging around with the wrong crowd. Defendant had a bad temper and, if he did not get his way, sometimes he would have a temper tantrum. Allan recalled his brother started wearing different clothing and became increasingly more disobedient to their parents and rebellious. Allan described

---

Wiley opined the lack of oxygen impacted defendant's executive function.

Dustin as having a problem with authority and with following rules. Defendant is an attention seeker; arrogant; cocky; boastful; very bright; very articulate; very manipulative; schemer.

The defense called two mental health experts at the penalty phase: Dr. Justin Wiley, a clinical psychologist,[40] and Sanket A. Vyas, M.D., a forensic psychiatrist.[41] Dr. Wiley conducted a mental status examination and reviewed defendant's records, but did not perform any testing on defendant. Wiley consulted two physicians regarding defendant, and using the DSM-IV profile, he diagnosed defendant with Bipolar Affective Disorder II, polysubstance abuse and dependency, and a history of Attention Deficit Hyperactivity Disorder (ADHD). Defendant's previous court-ordered testing revealed a full scale IQ of 79.[42] Dr. Vyas, whose testimony dove-tailed Dr.

---

[40] Dr. Wiley was retained by the defense approximately two weeks before he testified and admitted on the stand he had never before testified as an expert. He further conceded he did not write a report in this matter.

[41] At the conclusion of testimony from the second mental health expert and outside the presence of the jury, Judge Liljeberg chastised defense counsel for bringing in a second expert to say the exact same thing as the first, thereby wasting two hours of the jury's time.

[42] During the testimony of Dr. Wiley, the State objected to not being given the records this expert reviewed. Defense counsel finally handed the State a copy of the information while the expert was on the stand, notwithstanding the State had been

Wiley's, came up with the same diagnosis of defendant.

Dr. Wiley found significant the history of mental illness in the Dressner family. Defendant's paternal uncle, Eric, is depressed and sometimes suicidal; defendant's father was on Xanax for anxiety at the time of trial; Housand, defendant's paternal grandmother, tried twice to commit suicide and suffered from paranoid schizophrenia; defendant's mother suffered from extreme depression when defendant's brother was born and has panic disorder. In Dr. Wiley's opinion, a huge genetic component drives defendant's disorder.

Defendant suffered head trauma at the age of six or seven when he fell from a tree house and had semi-paralysis for twenty minutes. The emergency room did not x-ray the brain, only defendant's limbs. As noted above, defendant also suffers from ADHD, which was exacerbated at the age of eleven, when defendant's polysubstance abuse began.

Defendant was previously admitted to Methodist Pavilion Hospital, an inpatient psychiatric facility. After expulsion from that facility, defendant subsequently obtained intensive outpatient treatment for substance abuse at DePaul Psychiatric Hospital.

---

asking (and litigating) for production of those records since October 10, 2002.

Dr. Wiley opined defendant is not mentally ill, he has some responsibility, but he refused the help provided him. Prescriptions such as Lithium and Atarol would have helped manage defendant's problems, but he elected not to take his prescribed medications. Dr. Vyas concurred defendant was too obstinate to take his medicine for bipolar disorder and ADHD, both of which mental conditions are highly treatable.

Dr. Vyas opined defendant was not having a depressive episode when the crime occurred; rather, he was having a hypomanic episode. From what defendant told Dr. Vyas, when everything started happening, defendant experienced "a, kind of, force that he was just going along with, that he just kept getting revved up and amped up from one thing that happened to another," a "very high arousal; there was a lot of excitement going on." Nevertheless, the expert concluded defendant understood the criminality of his conduct.

Social/Employment. Defendant has never married and has no children. His employment history was provided by his brother, who indicated defendant was employed by McDonald's at the age of eighteen. No other work history is known. Defendant never served in the military.

Criminal history. Defendant's criminal history began when he was a juvenile. On August 13, 1997, when defendant was fourteen years of age, he was adjudicated delinquent on the charge of simple robbery. The period of supervision ended on August 13, 1999. On June 27, 2000, the then sixteen years of age defendant was adjudicated delinquent on the charge of simple burglary of an inhabited dwelling. The period of supervision ended on June 21, 2002, or two weeks after the murder of Paul Fasullo on June 6, 2002.

As an adult, defendant was arrested on June 18, 2001, and charged with armed robbery, which occurred in the French Quarter.[43] On August 21, 2001, defendant pled guilty to the reduced charged of simple robbery and was sentenced to three years at hard labor, suspended, and placed on two years active probation. Defendant's probation was revoked on August 14, 2003.

Defendant was eighteen and a half years of age at the time of the instant offense. He did not testify at either phase of his capital trial. However, defendant did communicate with the jury, first through body language,[44] and later during the penalty phase testimony of his mother, who read aloud from the stand a poem written by defendant.[45]

---

[43] In conjunction with the armed robbery charge, defendant was also charged with criminal mischief, illegal carrying of a weapon, receiving stolen things, and simple battery.

The victim of defendant's French Quarter robbery, William Knight, testified at the penalty phase and positively identified defendant in court as the person, who robbed him in 2001. Mr. Knight explained he was approached by two males, and one of them hit him over the head. While he was down on the ground, they took his wallet. Also testifying to those events was Sgt. Derek Gray, NOPD officer assigned to the Eighth District, who witnessed the robbery and testified he performed a safety patdown after he apprehended defendant and recovered Mr. Knight's wallet.

---

[44] During his guilt phase testimony, Sgt. Dennis Thornton noted at some point since defendant's arrest, but before his capital trial, defendant had gotten a tear-drop tattoo below his right eye. At the prosecutor's request, defendant stood before the jury box, displaying his facial tattoo. Although no explanation was given as to the significance of the tattoo at trial and there is no formally -accepted signification for such tattoos, we note the teardrop tattoo generally, but not always, signifies the person has killed someone. See *Henderson v. Cockrell,* 333 F.3d 592, 595 (5th Cir. 2003), cert. denied, 540 U.S. 1163, 124 S. Ct. 1170, 157 L. Ed. 2d 1208 (2003); *Commonwealth v. Silanskas,* 433 Mass. 678, 746 N.E.2d 445, 452-53 (Mass. 2001). See *contra, Gonzales v. Quarterman,* 458 F.3d 384, 394-95 (5th Cir. 2006)(teardrop tattoo can have "multiple meanings"), cert. denied, 549 U.S. 1323, 127 S.Ct. 1909, 167 L.Ed.2d 568 (2007).

[45] Shirlene Dressner read this poem, which defendant penned, to the jury:

> Mother, you taught me everything, and everything you've always given me, I've always kept it inside. You're the hard push in my life. There isn't anyone or anything I could be; it just wouldn't feel right if I didn't have you by my side.
>
> You were there for me to love and care for me when skies were gray, and when I was down, you always was there to comfort me. And no one else could be what you have been to me. You will always be the girl in my life for all times. You're always there

During the penalty phase, the defense presented nine mitigation witnesses: Allan Dressner, Jr., defendant's brother; Dr. Justin Wiley, a clinical psychologist; Dr. Sanket A. Vyas, a forensic psychiatrist; Rebecca Falgout, defendant's cousin; Allan Dressner, Sr., defendant's father; Erin and Catherine "Cathy" Sanders, friends of the family, who attended First Baptist Church of Westwego with defendant; William Edward Schnuelle, Associate Pastor and Senior Elder of Believer's Fellowship Church in Metairie, defendant's spiritual advisor; and Shirlene Dressner, defendant's mother. At the close of the penalty phase, defense counsel offered, for record purposes only, a certified copy of the sentence imposed on co-defendant, Kellen

---

> for me and always been around for me, even when I was bad.
>
> You showed me right from wrong. And you took up for me, even when everyone else was downing me. You always did understand. You gave me strength to go on. There was so many times, looking back, when I did wrong. But even though I was bad, you made me feel like I belong.
>
> There was many times when I saw a friend, you came to me saying I could face anything. And no one could replace you for space in my heart.
>
> Love you, Dustin.

Parker. The State stipulated Kellen Parker was sentenced to life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence.

On November 18, 2004, the district court imposed the sentence of death, as unanimously recommended by the jury.

PASSION, PREJUDICE AND OTHER ARBITRARY FACTORS

The first-degree murder of Paul Fasullo occurred on June 6, 2002, and following jury selection, trial commenced on May 20, 2004, just under two years after the crime was committed. On January 12, 2004, before defendant's initial trial setting, the defense filed a motion for change of venue, based on the media attention surrounding the recent trial of co-defendant, Kellen Parker, including as exhibits news articles from the Times-Picayune. The district court denied the motion, and the issue was never revisited when defendant's trial took place in May 2004. At any rate, the parties were able to conduct voir dire successfully and seat a jury of twelve, plus two alternate jurors, without incurring a single prospective juror, who indicated pre-trial publicity was so widespread as to affect his/her ability to render a fair and impartial decision. Although several prospective jurors were generally aware of the news surrounding defendant's case, no one indicated during voir dire they were unduly prejudiced by reports of defendant's crime and had reached a fixed opinion of his guilt.

The victim, Paul Fasullo, and his wife, Shannon Fasullo, are both Caucasian. Defendant is a Caucasian male; co-defendant, Kellen Parker, is an African American male, as is Troy Arnaud, an accessory to the crime. Race did not appear to be a motivating factor in defendant's decision to attack the Fasullos in their home.

Defendant's jury was composed of ten white females, one white male, and one black male. The two alternate jurors were both black females. The defense alleged the State's peremptory challenges were racially motivated after the State used seven out of nine peremptory challenges to strike African Americans from the jury. Likewise, the State accused the defense of the same after the defense used five out of six peremptory challenges to strike white males. After hearing the race-neutral articulations from both the State and the defense, the district court accepted the reasons as legitimate and, for the most part, found no *Batson* or *reverse-Batson* violation in the selection of defendant's jury, with one exception. Despite defense efforts to remove juror Jaelyn Burst, the district court denied the peremptory challenge and seated her as the twelfth juror on the panel. However, because no grounds existed for excluding the juror for cause, her presence on the panel did not interject an arbitrary factor into the proceedings. In all other respects, the record supports defendant's capital trial was conducted free of any racial taint.

AGGRAVATING CIRCUMSTANCES

The State relied on three aggravating circumstances under La. Code Crim. Proc. art. 905.4(A), and the jury returned the verdict of death, agreeing two aggravating circumstances were supported by the evidence: (1) the offense was committed in an especially heinous, atrocious or cruel manner; and (2) the offender knowingly created a risk of death or great bodily harm to more than one person. La. Code Crim. P. art. 905.4(A)(7) and (4), respectively; see *Jackson v. Virginia,* 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). The jury heard testimony from the surviving victim, Shannon Fasullo, who was stabbed repeatedly by defendant, as proof defendant intended to murder more than one victim, under La. Code Crim. Proc. art. 905.4(A)(4). Defendant's death sentence is firmly grounded on that aggravating circumstance.

Regarding the heinousness aggravator, as discussed previously, the State's evidence presented in the guilt phase and reintroduced at the penalty phase established the brutal stabbing of both Paul and Shannon Fasullo. While Paul died from a single stab wound to the chest, he incurred several other stab wounds and blunt force injuries to his head and neck. Shannon, who survived, suffered more cutting wounds than Paul and endured both physical and mental torture.

Furthermore, to demonstrate defendant's cruelty, in its penalty phase closing argument, the State reminded the jurors Dr. Garcia had opined Paul Fasullo would not have lost consciousness for approximately three to five minutes after sustaining the stab wound to his chest. The prosecutor then replayed the first three minutes of the 911 tape for the jury, using his own watch to mark when three minutes had elapsed, and suggested how cruel it was the last sounds Paul heard as he lay dying were the blood-curdling screams of his wife and baby, whom he was physically unable to help. The grim reality is defendant carried out his murderous rampage in front of the victims' innocent, two-year-old baby girl, Samantha.[46]

The jury was entitled to hear the witnesses' description of Shannon's numerous stab wounds, the description of Paul Fasullo's final moments of life, as well as the coroner's evaluation of his cause of death. The inclusion of this aggravating circumstance did not interject an arbitrary factor into these proceedings because evidence of the manner in which the offense was committed and of the nature of the victim's injuries was relevant and properly admitted at trial. See *State v. Roy*, 95-0638 (La. 10/04/96), 681 So.2d 1230, 1242, *cert. denied*, 520 U.S. 1188, 117 S. Ct. 1474, 137 L. Ed. 2d 686 (1997). In this case, the evidence presented by the State during the guilt stage had already fully informed the jury of the circumstances surrounding the victim's death. Thus, reintroduction of that evidence at the penalty phase did not interject an arbitrary factor into the proceeding. See La. Code Crim. Proc. art 905.2(A)("The jury may consider [at sentencing] any evidence offered at the trial on the issue of guilt.").

---

[46] According to the CSIR, the victim's brother, Anthony (A.J.) Fasullo, told the representative from the department of probation and parole "Sammie" is now seeing a psychiatrist. "She has terrible memories of this tragedy." Once, in the car with her grandparents, Sammie began screaming hysterically, and when they asked what was wrong, she said, "I have blood all over my hands."

PROPORTIONALITY REVIEW

Although the federal Constitution does not require proportionality review, *Pulley v. Harris,* 465 U.S. 37, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984), comparative proportionality review remains a relevant consideration in determining the issue of excessiveness in Louisiana. *State v. Burrell,* 561 So.2d 692, 710 (La. 1990), *cert. denied,* 498 U.S. 1074, 111 S.Ct. 799, 112 L.Ed.2d 861 (1991); *State v. Wille,* 559 So.2d 1321, 1340 (La. 1990); *State v. Thompson,* 516 So. 2d 349, 357 (La. 1987), *cert. denied,* 488 U.S. 871, 109 S. Ct. 180, 102 L. Ed. 2d 149 (1988). This Court, however, has set aside only one death sentence as disproportionately excessive under the post-1976 statutes, finding in that one case, *inter alia,* a sufficiently "large number of persuasive mitigating factors." *State v. Sonnier,* 380 So.2d 1, 9 (La. 1979); see also *State v. Weiland,* 505 So.2d 702, 707-10 (La. 1987)(in case reversed on other grounds, dictum suggesting death penalty disproportionate).

This Court reviews death sentences to determine whether the sentence is disproportionate to the penalty imposed in other cases, considering both the offense and the offender. If the jury's recommendation of death is inconsistent with sentences imposed in similar cases in the same jurisdiction, an inference of arbitrariness arises. *Sonnier*, 380 So.2d at 7.

The State's Capital Sentence Review Memorandum reveals, since 1976, the State has proceeded to trial on eighty-three first-degree murder cases in the Twenty-Fourth Judicial District Court, and of these cases, juries have recommended the death penalty twenty-eight times, including the present case.

First case. Benjamin Berry fatally shot a law enforcement officer during a bank robbery. Berry was executed in 1987. *State v. Berry*, 391 So.2d 406 (La. 1980), *cert. denied*, 451 U.S. 1010, 101 S. Ct. 2347, 68 L. Ed. 2d 863 (1981).

Second case. Reginald Smith shot his victim in a lounge parking lot. The victim's two friends ran away from the direction of the gunfire. Defendant was found guilty of first-degree murder because a witness saw defendant fire two additional shots in the direction of the parking lot, and the jury found the aggravating circumstance of knowingly created a risk of death or great bodily harm to more than one person. Smith died of natural causes in January 1983. *State v. Smith*, 391 So.2d 1182 (La. 1980).

Third case. Robert Sawyer killed the female victim by beating her and inflicting karate kicks. She was also scalded and set on fire after twice being raped by co-defendant, Charles Lane. In March 1993, Sawyer was executed by lethal injection. *State v. Sawyer*, 422 So.2d 95 (La. 1982); *Sawyer v. State*, 422 So.2d 1136 (La. 1983), *cert. denied*, 466 U.S. 931, 104 S. Ct. 1719, 80 L. Ed. 2d 191 (1984).

Fourth case. Tyronne Lindsey killed a shopper in the Oakwood Mall parking lot. After numerous resentencings and a retrial, Lindsey was once again sentenced to death. *State v. Lindsey,* 543 So.2d 886 (La. 1989), *cert. denied,* 494 U.S. 1074, 110 S.Ct. 1796, 108 L.Ed.2d 798 (1990). On April 7, 2004, he was resentenced to life in prison pursuant to *Atkins v. Virginia,* 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002).

Fifth case. Jimmy Robinson killed the husband of an apartment complex manager in her presence during an armed robbery. This Court affirmed the conviction, but vacated the death sentence, and on remand, Robinson received a sentence of life imprisonment without benefit of parole, probation, or suspension of sentence. *State v. Robinson,* 421 So.2d 229 (La. 1982).

Sixth case. Johnny Taylor stabbed the victim multiple times and stole his car. This Court affirmed the conviction and death sentence. *State v. Taylor,* 422 So.2d 109 (La. 1982), *cert. denied,* 460 U.S. 1103, 103 S. Ct. 1803, 76 L. Ed. 2d 367 (1983). Taylor was executed on February 29, 1984.

Seventh case. Lane Nelson robbed and stabbed a transvestite, who had picked him up hitchhiking to New Orleans. Before his death sentence was carried out, Nelson's conviction was reversed, and on retrial, he was convicted of second-degree murder and sentenced to life imprisonment without benefit of parole, probation, or suspension of sentence. *State v. Nelson,* 459 So.2d 510 (La. 1984), *cert. denied,* 471 U.S. 1030, 105 S.Ct. 2050, 85 L.Ed.2d 322 (1985). His sentence was commuted by the governor.

Eighth case. Leslie Lowenfield shot and killed his ex-girlfriend, her daughter, her parents, and her current boyfriend. This Court affirmed the conviction and death sentence. *State v. Lowenfield,* 495 So.2d 1245 (La. 1985), *cert. denied,* 476 U.S. 1153, 106 S. Ct. 2259, 90 L. Ed. 2d 704 (1986). Lowenfield was subsequently executed in the electric chair.

Ninth case. Glen Weiland stabbed his girlfriend and her ex-husband, killing the female victim. This Court reversed Weiland's first-degree murder conviction. *State v. Weiland,* 505 So.2d 702 (La. 1987). On retrial, the state amended the indictment to second-degree murder. The jury subsequently convicted defendant of manslaughter, and he was sentenced to twenty-one years imprisonment at hard labor.

Tenth case. Robert Tassin shot two victims, one fatally, in the course of an armed robbery/drug deal. The Court affirmed his conviction and sentence. *State v. Tassin,* 536 So.2d 402 (La. 1988), *cert. denied,* 493 U.S. 874, 110 S. Ct. 205, 107 L. Ed. 2d 159 (1989). Tassin obtained a new trial pursuant to federal habeas corpus on March 23, 2007. The Fifth Circuit affirmed. *Tassin v. Cain,* 517 F.3d 770 (5th Cir. 2008). He is awaiting retrial.

Eleventh case. Glen Seals killed a cab driver in the course of an armed robbery. This Court affirmed his conviction and death sentence. *State v. Seals*, 95-0305 (La. 11/25/96), 684 So.2d 368, *cert. denied*, 520 U.S. 1199, 117 S. Ct. 1558, 137 L. Ed. 2d 705 (1997). However, in post-conviction proceedings, this Court reversed his conviction and sentence on grounds the district court failed to make a formal determination of defendant's competency to proceed after signing a motion appointing a psychiatrist to examine the defendant. *State ex rel. Seals v. State*, 00-2738 (La. 10/25/02), 831 So. 2d 828. He is currently awaiting retrial.

Twelfth case. Manuel Ortiz's case involved a murder-for-hire in which the defendant employed a "hitman" to kill his wife and her friend. This Court affirmed defendant's conviction and sentence. *State v. Ortiz*, 96-1609 (La. 10/21/97), 701 So.2d 922, *cert. denied*, 524 U.S. 943, 118 S.Ct. 2352, 141 L.Ed.2d 722 (1998).

Thirteenth case. Julius Lucky shot two of his co-workers, one fatally, during the course of an armed robbery. This Court affirmed his conviction and death sentence. *State v. Lucky*, 96-1687 (La. 4/13/99), 755 So.2d 845, *cert. denied*, 529 U.S. 1023, 120 S. Ct. 1429, 146 L. Ed. 2d 319 (2000).

Fourteenth case. Edward Harris shot and killed two pedestrians in a drive-by shooting. Finding a *Batson* violation during jury selection, this Court reversed the first-degree murder conviction and death sentence and remanded the case to the district court for a new trial. *State v. Harris*, 01-0408

(La. 6/21/02), 820 So. 2d 471. His retrial remains pending. See *State v. Harris*, 07-1735 (La. 9/21/07), 966 So.2d 1038 (Calogero, C.J., concurring).

Fifteenth case. Teddy Chester killed a cab driver during the course of an armed robbery. This Court affirmed his conviction and death sentence. *State v. Chester*, 97-2790 (La. 12/1/98), 724 So. 2d 1276, *cert. denied*, 528 U.S. 826, 120 S. Ct. 75, 145 L. Ed. 2d 64 (1999).

Sixteenth case. Allen Snyder stabbed his wife and her new boyfriend, killing the boyfriend. This Court conditionally affirmed his conviction and death sentence, but remanded the case to the district court for a retrospective determination of his competence to stand trial, if one could be made. *State v. Snyder*, 98-1078 (La. 4/14/99), 750 So.2d 832 (Snyder I). On remand, the district court determined a retrospective determination of competency was possible and defendant was competent to stand trial. Defendant appealed, and this Court affirmed. *State v. Snyder*, 98-1078 (La. 4/14/04), 874 So.2d 739 (Snyder II). The United States Supreme Court vacated the judgment and remanded for further consideration of defendant's *Batson* claims in light of *Miller-El v. Dretke*, 545 U.S. 231, 125 S.Ct. 2317, 162 L.Ed.2d 196 (2005). *Snyder v. Louisiana*, 545 U.S. 1137, 125 S.Ct. 2956, 162 L.Ed.2d 884 (2005). On remand, this Court again affirmed, finding Snyder had failed to carry his ultimate burden of persuasion the State exercised its peremptory challenges in a purposefully discriminatory manner. *State v. Snyder*, 98-1078 (La. 9/6/06), 942 So. 2d 484

(Calogero, C.J., Kimball and Johnson, JJ., dissent with reasons)(*Snyder* III). Once again, the United States Supreme Court granted certiorari and reversed the conviction, holding the trial judge committed clear error in rejecting defendant's claim the prosecution exercised some of its peremptory challenges based on race in violation of *Batson*; the case was remanded for further proceedings. *Snyder v. Louisiana,* 552 U.S. 472, 128 S.Ct. 1203, 170 L.Ed.2d 175 (2008). Snyder is awaiting retrial.

Seventeenth case. Emmett Taylor killed a sixty-nine-year-old employee of Rhodes Drug Store, during an armed robbery attempt. This Court affirmed the conviction and death sentence in *State v. Taylor,* 99-1311 (La. 1/17/01), 781 So.2d 1205, *cert. denied*, 534 U.S. 844, 122 S. Ct. 106, 151 L. Ed. 2d 64 (2001).

Eighteenth case. Damon Thibodeaux killed fourteen-year-old Crystal Champagne on the levee during an aggravated rape. This Court affirmed his conviction and death sentence in *State v. Thibodeaux,* 98-1673 (La. 9/8/99), 750 So.2d 916, *cert. denied*, 529 U.S. 1112, 120 S. Ct. 1969, 146 L. Ed. 2d 800 (2000).

Nineteenth case. Elzie Ball killed a Budweiser deliveryman during the course of an armed robbery. On May 23, 1997, Ball was convicted of first-degree murder and sentenced to death. This Court affirmed the conviction and death sentence in *State v. Ball,* 00-2277 (La. 1/25/02), 824 So.2d 1089, *cert. denied*, 537 U.S. 864, 123 S. Ct. 260, 154 L. Ed. 2d 107(2002).

Twentieth and Twenty-first cases. Lawrence Jacobs and Roy Bridgewater committed the double murder of an adult male victim and his mother during the course of an aggravated burglary. The defendants were tried separately, convicted, and each sentenced to death. This Court reversed Jacobs's conviction and death sentence on grounds the district court erred in denying defendant's cause challenge and remanded for a new trial. *State v. Jacobs,* 99-1659 (La. 6/29/01), 789 So.2d 1280. During the pendency of his retrial, the United States Supreme Court rendered its decision in *Roper v. Simmons,* 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1(2005)(Eighth Amendment precludes capital punishment for offenders under the age of eighteen when they committed their crimes), making Jacobs, who was sixteen at the time of the offense, ineligible to face capital sentencing on retrial. On retrial following this Court's reversal of the first-degree murder conviction and death sentence, Jacobs was convicted of two counts of second-degree murder; he was sentenced to two consecutive life sentences at hard labor without the benefit of parole, probation, or suspension of sentence. Defendant appealed. The Fifth Circuit reversed defendant's convictions and remanded on the basis of *Batson* violations. *State v. Jacobs,* 07-0887 (La. App. 5 Cir. 5/12/09), 13 So.3d 677. This Court reversed the appellate court's determination and remanded to the court of appeal for consideration of defendant's remaining issues raised on appeal. *State v. Jacobs,* 09-1304 (La. 4/5/10), 32 So.3d 227 (per curiam).

In a separate appeal, this Court found the evidence insufficient to support a first-degree murder conviction and, thus, reduced Roy Bridgewater's conviction to guilty of second-degree murder, reversed the death sentence, and sentenced him to life in prison without benefit of parole, probation, or suspension of sentence. *State v. Bridgewater,* 00-1529 (La. 1/15/02), 823 So.2d 877 (Victory, Knoll, Weimer, J.J., dissenting with reasons). However, on rehearing, this Court held the evidence was sufficient to sustain the first-degree murder conviction and the death penalty was not disproportionate. This Court, therefore, reinstated Bridgewater's conviction and death sentence. *State v. Bridgewater,* 00-1529 (La. 6/21/02), 823 So.2d 877 (on reh'g), *cert. denied,* 537 U.S. 1227, 123 S.Ct. 1266, 154 L.Ed.2d 1089 (2003). Bridgewater was subsequently resentenced to life in prison pursuant to *Roper v. Simmons,* 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005).

Twenty-second case. Jarrell Neal killed two people during a drug-related burglary. On March 1, 1999, Jarrell Neal was convicted of two counts of first-degree murder and sentenced to death. This Court affirmed his conviction and death sentence in *State v. Neal,* 00-0674 (La. 6/29/01), 796 So.2d 649, *cert. denied,* 535 U.S. 940, 122 S. Ct. 1323, 152 L. Ed. 2d 231 (2002).

Twenty-third case. Ryan Matthews shot and killed the victim/owner during a convenience store robbery. Defendant also shot at an eyewitness, but missed. The jury found defendant guilty as charged and sentenced him to death on the basis of two aggravating circumstances: 1) during an armed robbery; and 2) more than one person. Matthews's appeal was filed in this Court, but the case was remanded to the district court for further evidentiary proceedings related to DNA evidence supporting a claim of actual innocence. The district court granted Matthews's motion for a new trial, and on August 4, 2004, the state agreed it would not reprosecute the defendant.

Twenty-fourth case. Thoa Tan Lam entered the home of a former employer and shot four people, two of whom died, and then shot himself in an unsuccessful suicide attempt. Defendant was sentenced to death, and his appeal was filed in this Court, but the case has been remanded for the purpose of conducting an evidentiary hearing on the defendant's claim the inadequacy of his interpreter denied him due process. On October 28, 2002, the district court notified this Court it had appointed an expert Vietnamese interpreter to review the court reporter's tapes, etc., as ordered by this Court. No action appears to have been taken on this appeal since December 9, 2003.

Twenty-fifth case. Michael Legrand stabbed the victim to death with several weapons, including kitchen knives, scissors, and screwdrivers, during the course of an armed robbery. On September 28, 2000, Legrand was convicted of first-degree murder and sentenced to death. This Court affirmed the conviction and death sentence in *State v. Legrand,* 02-1462 (La. 12/3/03), 864 So. 2d 89, *cert. denied,* 544 U.S. 947, 125 S.Ct. 1692, 161 L.Ed.2d 523 (2005).

Twenty-sixth case. Shawn Higgins killed the victim with a single gun shot during a confrontation in front of a bar and then ran away. On May 10, 2002, the jury found Higgins guilty of first-degree murder and recommended a death sentence. This Court set aside the jury's verdict and sentence on the grounds the state presented insufficient evidence to support a finding the murder took place during the perpetration or attempted perpetration of an armed robbery. This Court then rendered a judgment of guilty of second-degree murder and remanded for sentencing to life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence. *State v. Higgins,* 03-1980 (La. 4/1/05), 898 So.2d 1219, *cert. denied*, 546 U.S. 883, 126 S.Ct. 182, 163 L.Ed.2d 187 (2005).

Twenty-seventh case. Dustin Dressner, along with co-perpetrator Kellen Parker, each stabbed the victim and the victim's wife a number of times after forcing their way into the victims' home. While the victim's wife survived the attack, the victim died at the scene. On May 23, 2004, the jury found Dressner guilty of first-degree murder and recommended a death sentence, and on November 18, 2004, the district court sentenced Dressner to death. Co-defendant Parker was found guilty as charged of first-degree murder in November 2003, but the jury was unable to reach a consensus in the penalty phase, and thus, Parker was sentenced to life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence.

Twenty-eighth case. Christopher Arceneaux shot the victim once during an attempted armed robbery. The victim's 12-year-old daughter witnessed the murder. Arceneaux was found guilty of first-degree murder and sentenced to death. However, during the pendency of Arceneaux's capital appeal in this Court, defendant and the state reached an agreement. On February 21, 2008, the district court vacated the death sentence, and defendant pled guilty to first-degree murder in exchange for a sentence of life imprisonment at hard labor "without benefit." Defendant waived all further appeals of right, and this Court granted defendant's motion to dismiss his appeal. *State v. Arceneaux,* 06-2986 (La. 2/28/08), 979 So.2d 1262.

The brief outline of the cases above provides strong support for an argument the death penalty imposed in this case is not disproportionate. Employing a statewide basis of comparison, the defendant fares no better. Cases are legion in which this Court has affirmed capital sentences based upon crimes committed in the home. See *State v. Holmes,* 06-2988 (La. 12/2/08), 5 So.3d 42, *cert. denied,* U.S. ,130 S.Ct. 70, 175 L.Ed.2d 233 (2009); *State v. Coleman,* 06-0518 (La. 11/2/07), 970 So.2d 511 (conviction reversed and death sentence vacated by this Court on a *Batson* violation; remanded for new trial); *State v. Leger,* 05-0011 (La. 7/10/06), 936 So. 2d 108, *cert. denied,* 549 U.S. 1221, 127 S. Ct. 1279, 167 L. Ed. 2d 100 (2007); *State v. Blank,* 04-0204

(La. 4/11/07), 955 So. 2d 90, *cert. denied*, 552 U.S. 994, 128 S. Ct. 494, 169 L. Ed. 2d 346 (2007); *State v. Bridgewater*, 00-1529 (La. 6/21/02), 823 So.2d 877 (on reh'g), *cert. denied*, 537 U.S. 1227, 123 S.Ct. 1266, 154 L.Ed.2d 1089 (2003); *State v. Jacobs*, 99-1659 (La. 6/29/01), 789 So.2d 1280; *State v. Howard*, 98-0064 (La. 4/23/99), 751 So.2d 783, *cert. denied*, 528 U.S. 974, 120 S. Ct. 420, 145 L. Ed. 2d 328 (1999); *State v. Gradley*, 97-0641 (La. 5/19/98), 745 So.2d 1160; *State v. Robertson*, 97-0177 (La. 3/4/98), 712 So.2d 8, *cert. denied*, 525 U.S. 882, 119 S. Ct. 190, 142 L. Ed. 2d 155 (1998); *State v. Code*, 627 So.2d 1373 (La. 1993), *cert. denied*, 511 U.S. 1100, 114 S.Ct. 1870, 128 L.Ed.2d 490 (1994); *State v. Burrell*, 561 So.2d 692 (La. 1990), *cert. denied*, 498 U.S. 1074, 111 S. Ct. 799, 112 L. Ed. 2d 861 (1991); *State v. Perry*, 502 So.2d 543 (La. 1986), *cert. denied*, 484 U.S. 872, 108 S. Ct. 205, 98 L. Ed. 2d 156 (1987); *State v. Williams*, 490 So.2d 255 (La. 1986), *cert. denied*, 483 U.S. 1033, 107 S. Ct. 3277, 97 L. Ed. 2d 780 (1987); *State v. Wingo*, 457 So.2d 1159 (La. 1984), *cert. denied*, 471 U.S. 1030, 105 S. Ct. 2049, 85 L. Ed. 2d 322 (1985); *State v. Glass*, 455 So.2d 659 (La. 1984), *cert. denied*, 471 U.S. 1080, 105 S.Ct. 2159, 85 L.Ed.2d 514 (1985). Compared to these cases, the death sentence in this case is not disproportionate. We find nothing in any of the post trial documents filed pursuant to La.S.Ct.R. XXVIII warrants reversal of defendant's death sentence.

DECREE

For the reasons assigned herein, the defendant's conviction and death sentence are affirmed. This judgment becomes final on direct review when either: (1) the defendant fails to petition timely the United States Supreme Court for certiorari; or (2) that Court denies his petition for certiorari; and either (a) the defendant, having filed for and been denied certiorari, fails to petition the United States Supreme Court timely, under its prevailing rules, for rehearing of denial of certiorari; or (b) that Court denies his petition for rehearing. The district court shall, upon receiving notice from this Court under La. Code Crim. Proc. art. 923 of finality of direct appeal, and before signing the warrant of execution, as provided by La. Rev. Stat. Ann. § 15:567(B), immediately notify the Louisiana Indigent Defense Assistance Board and provide the Board with reasonable time in which: (1) to enroll counsel to represent the defendant in any State post-conviction proceedings, if appropriate, pursuant to its authority under La. Rev. Stat. Ann. § 15:169; and (2) to litigate expeditiously the claims raised in that application, if filed in the state courts.

APPENDIX B

SUPREME COURT OF LOUISIANA

STATE OF LOUISIANA

v.

DUSTIN DRESSNER

08-KA-1366 (La. 07/06/2010); __ So. 2d __.

ON APPEAL FROM THE TWENTY-FOURTH JUDICIAL DISTRICT COURT, FOR THE PARISH OF JEFFERSON, HONORABLE HANS J. LILJEBERG, JUDGE

UNPUBLISHED APPENDIX

PRETRIAL

Assignment of Error No. II

In this assignment of error, appellate counsel contends the district court's denial of defendant's motion to adjourn at a reasonable time abridged defendant's right to a public trial where the proceedings continued past 11:00 p.m., but the public could not enter because the doors to the courthouse were locked.

The Sixth Amendment of the United States Constitution provides, in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury...." Similarly, the Louisiana Constitution guarantees a defendant "a speedy, public, and impartial trial." La. Const. art. I, §16.

The trial court is given broad discretion in controlling trial proceedings. *State v. Reeves,* 263 La. 923,269 So.2d 815 (1972). La. Code Crim. Proc. art. 17 states it is the trial court's duty "to require that criminal proceedings shall be conducted with dignity and in an orderly and expeditious manner. ... " A trial judge is accorded "much discretion in determining whether to grant a recess, such that the proceedings are conducted with dignity and in an orderly and expeditious manner, and justice is done." *State v. Humphreys,* 319 So.2d 344,346 (La. 1975).

In *State v. Loyd,* 489 So.2d 898, 903 (La. 1986),[1] the Court held it was not unreasonable for the jury's deliberations, which began at 5:20 p.m., to last until 9:10 p.m. In *State v. Wright,* 445 So.2d 1198, 1203 (La. 1984), the Court held the defendant was not denied a fair trial where the jury retired to deliberate at 11:00 p.m. and did not reach a verdict until 3:00 a.m. This Court reasoned the four hours spent in deliberations demonstrated the verdict was not unduly hurried by the late hour. *Id.* In *State v. Felde,* 422 So.2d 370, J79 (La. 1982),[2] the Court held no abuse of the discretion accorded a trial court by

---

[1] Certiorari denied by *Loyd v. Louisiana,* 481 U.S. 1042, 107 S.Ct. 1984,95 L.Ed.2d 823 (1987).

[2] Certiorari denied by *Felde v. Louisiana,* 461 U.S. 918, 103 S.Ct. 1903, 77 L.Ed.2d 290 (1983).

La. CodeCrim. Proc. art. 17 occurred where a death penalty trial continued for eleven straight days, often for more than ten hours a day. In *State v. Mack,* 435 So.2d 557, 565 (La. App. 1st Cir.), *writ denied,* 440 So.2d 727 (La. 1983), the court of appeal found no abuse of discretion in failing to call for a recess after trial resumed at 7:50 a.m., the jury retired for deliberations at 10:40 p.m., and returned a verdict by 1:50 a.m., but defense counsel did not make a motion to recess at any time, nor did jurors request a break after deliberations began.

In the present case, the defense filed a pre-trial motion captioned "Motion to Adjourn at a Reasonable Time," which requested court adjourn at a reasonable time in light of the grave import of a capital case and the defense attorneys' need to prepare for the next day's proceedings. While the motion also stated, "[a] traditional work day consists of eight hours .... An excessive work schedule would prohibit Mr. Dressner from receiving effective representation," it did not otherwise define what constitutes a "reasonable time" for adjournment. The State timely responded, and the district court held a hearing on the matter on July 17, 2003. The district court denied the motion, observing:

> I will be balancing ... the rights of the defendants with the fact that we're going to have at least 14 people cooped up in a hotel room. I can tell you right now, that we will work hard and ...try and get this thing done as quickly as possible. If at some point I feel like

> everybody has had enough and things aren't -- to the point where somebody's going to be prejudiced, then we'll adjourn ... but I'm not just going to order, you know, make a standing rule that we're going to stop at 5: 00 every day or something like that.

True to his word, Judge Liljeberg conducted defendant's capital trial in respect of the needs and wishes of the sequestered jury, and in every case when they were given an" opportunity, the jurors always chose to keep working. Friday, May 21, 2004, was the first day the jury heard testimony in the guilt phase.[3] After testimony from at least six State witnesses, a bench conference was held in which defense counsel announced:

> [Defense Counsel]: Judge, it has been brought to our attention that the jurors intend -- that the jurors want to stay and take testimony until ten 0' clock. We're asking the Court to allow us to

---

[3] According to the court minutes, on Wednesday, May 19, 2004, jury selection was completed, and court adjourned at 9:50 p.m. The following day, May 20, 2004, court commenced at 9:15 a.m., at which time the judge made his preliminary remarks to the jury and the State gave its guilt phase opening statement. Then, the proceedings ground to a halt when the defense requested a stay and the Fifth Circuit granted the stay based on a motion in limine being litigated. Consequently, no further action on the trial transpired that morning after the State's opening statement, and trial did not recommence until May 21, 2004, at 12:15 p.m.

> break at an earlier time than ten o'clock....
>
> ***
>
> Ten o'clock is just, in my opinion, way too late. We've got some things that we need to do.... I have witnesses that I need to prep and things that I need to do in connection with this case. If I get out of here at ten o'clock tonight, there's no way I'm going to be able to do any of that stuff.
>
> ***
>
> I don't know if the State has any objection.
>
> [The State]: No. The only thing that I was going to say is that, I was under the impression, to say it different than Defense, is that you [*i.e.*, the judge] were going to leave it up to the jurors, as late as they wanted to, **considering we didn't do anything at all yesterday,** so -- (emphasis supplied).

The district court indicated, as long as everyone was holding up okay, he wanted to try to accommodate the desires expressed by the jury to work until 10 o'clock. At approximately 7:00 p.m., when the court broke for dinner, the jury continued to signal they preferred to work on.[4] So as not to break up the testimony of the final State witness for the evening (Troy Arnaud), the district court did not adjourn that night (May 21,2004), until 11:27 p.m., at which point, the district court made the following note of evidence:

> I want the Record to note that Ms. Short [defense counsel], throughout the testimony of this witness, would leave for, you know, approximately, an hour at a time. I just want the Record clear --
>
> ***
>
> I just want to make it clear on that, you had left another -- earlier in the night too, to go, when they unlocked the building --

Notably, during trial, none of the defense attorneys expressed any concern whatsoever regarding defendant's right to a public trial. Their dispute with working past "a reasonable hour" was for their trial preparation. However, as apparent from the district court's announcement, at least one of the attorneys apparently took the opportunity to leave, although she never stated her purpose in leaving. Nevertheless, even though the defense pretrial motion as well as appellate counsel's argument in brief both assert trial should be conducted during hours in which the Jefferson Parish courthouse is open and accessible to the public to preserve defendant's Sixth Amendment rights, that was not the reason argued repeatedly at trial.[5] Moreover, the record is silent as to any member of the public being denied access to defendant's trial ,because the trial proceeded into the night. Consequently defendant fails to state a claim worthy of relief.

---

[4] It should be noted, at this point, counsel's concern about continuing on into the evening hours was not with regard to any deprivation of defendant's right to a public trial, but rather, "it's going to be difficult for the attorneys to eat within an hour. Everything over here is shut down." The district court gave counsel some dining suggestions, which seemed to temporarily pacify the attorney. The district court also permitted one of the three defense attorneys to leave to begin prepping witnesses. However, another defense attorney later objected to even taking any more breaks because they were having to work until 10 o'clock, which prompted the district court's retort: "Well, then you better bring out a bucket, because the jurors have to go to the bathroom."

VOIR DIRE

Assignment of Error No. V

In this assignment of error, defendant argues the district court erroneously truncated the *Batson*[6] analysis by ruling the defense had no right to rebut the State's explanation for striking African American jurors and by failing to make a ruling at the third stage of the inquiry.

---

[5] The State's brief suggests the defense argument is erroneous because the Twenty-Fourth Judicial District Court has security guards at the main entrance so anyone wishing to enter or exit the trial "after hours" can do so.

[6] *Batson* v. *Kentucky,* 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

In *Batson,* the Supreme Court held an equal protection violation occurs if a party exercises a peremptory challenge to exclude a prospective juror on the basis of a person's race, outlining a three-step process for evaluating claims of purposeful discrimination. *Batson,* 476 U.S. at 96-98, 106 S.Ct. at 1722; *see also* La. Code Crim. Proc. art. 795. First, the defendant must make a prima facie showing of discriminatory strikes. *Id.,* 476 U.S. at 96-97, 106 S.Ct. at 1723-24. Second, if the requisite showing is made, the *Batson* burden shifts to the state to articulate racially-neutral explanations for striking the jurors in question. *Id.,* 476 U.S. at 97- 98, 106 S.Ct. at 1723-24. "The neutral explanation must be one which is clear, reasonably specific, legitimate and related to the particular case at bar." *State v. Collier,* 553 So.2d 815, 820 (La. 1989). Third, if the race-neutral explanation is tendered, the trial court must decide whether the defendant has proven purposeful discrimination. *Purkett v. Elem,* 514 U.S. 765, 767-68, 115 S.Ct. 1769, 1770-71, 131 L.Ed.2d 834 (1995)(per curiam); *Batson,* 476 U.S. at 98, 106 S.Ct. at 1723.

Significantly, the *Batson* explanation does not need to be persuasive or even plausible, and unless a discriminatory intent is inherent in the explanation, the reason offered will be deemed race-neutral. *Purkett,* 514 U.S. at 767-68, 115 S.Ct. at 1771.

The *Hernandez v. New York* court explained:

> A neutral explanation in the context of our analysis here means an explanation based on something other than the race of the juror. At this step of the inquiry, the issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the [party's] explanation, the reason offered will be deemed race neutral.

Hernandez v. New York, 500 U.S. 352, 359, 111 S.Ct. 1859, 1866, 114 L.Ed.2d 395 (1991).

The ultimate burden of persuasion remains on the party raising the challenge to prove purposeful discrimination. *Purkett,* 514 U.S. at 768, 115 S.Ct. at 1771; *Hernandez,* 500 U.S. at 359, 111 S.Ct. at 1866. The Supreme Court's recent *Batson* exegeses, *Thaler* v. *Haynes,* _ U.S. _, 130 S.Ct. 1171, _ L.Ed.2d _ (2010) and *Snyder* v. *Louisiana,* 552 U.S. 472, 128 S.Ct. 1203, 1207, 170 L.Ed.2d 175 (2008), have left this familiar jurisprudential landscape completely unchanged.

In *Snyder,* the Supreme Court observed the trial court has a pivotal role in evaluating *Batson* claims because the third step of the *Batson* inquiry involves an evaluation of the prosecutor's credibility, and also because "race-neutral reasons for peremptory challenges often invoke a juror's demeanor (*e.g.,* nervousness, inattention), making the trial court's first-hand observations of even greater importance." *Snyder,* 552 U.S. at 477, 128

S.Ct. at 1208.[7] Consequently, a reviewing court owes the district judge's evaluations of discriminatory intent great deference and should not reverse them unless they are clearly erroneous. *Hernandez,* 500 U.S. at 364, 111 S.Ct. at 1868-69; *Batson,* 476 U.S. at 98, n.21, 106 S.Ct. at 1724, n. 21 ("Since the trial judge's findings in the context under consideration here largely will turn on evaluation of credibility, a reviewing court ordinarily should give those findings great deference.")

In the present case, defendant presents the tenuous claim the district court truncated step three in the *Batson* analysis by refusing to allow the defense to rebut the race-neutral reasons put forth by the State and, thus, precluded the defense from meeting its burden of establishing purposeful discrimination.[8] *See Miller-El v. Cockrell,* 537 U.S.

---

[7] The same *Batson* jurisprudential framework applies to Assignment VI, *infra,* and thus, the same statement of law will not be reproduced in that section.

[8] At trial, the State similarly complained the district court had skipped over step one of *Batson,* and even though the district court had not found the defense had established a prima facie case, the court nevertheless required the State to articulate reasons, to which ruling the State took exception:

> And for the record, the State emphatically disagrees with the Court's requirement of the State giving racial issue reasons given that the State -- that there is no pattern in the fact that there are two selected African Americans....

However, the Supreme Court's decision in *Hernandez v. New York,* 500 U.S. 352, 359,111 S.Ct. 1859, 1866, 104 L.Ed.2d 395 (1991), held the issue of whether the defendant has established a prima facie case becomes moot if the court requires and the prosecutor responds with his race-neutral reasons for excusing the prospective jurors. A trial judge may, therefore, effectively collapse the first two stages of ***Batson*** and rule on the question of discriminatory intent without deciding, or even deciding incorrectly, the question of whether the defendant established a prima facie case of purposeful discrimination.

As a means of encouraging trial courts to seek explanations when a party uses a peremptory challenge, the Supreme Court has clarified, for purposes of *Batson's* first step, a moving party need only raise a reasonable inference to establish a prima facie showing of purposeful discrimination. *Johnson* v. *California,* 545 U.S. 162, 125 S.Ct. 2410, 162L.Ed.2d 129 (2005); State v. *Elie, 05-1569,* p. 6 (La. 7110/06), 936 So.2d 791, 796. *Johnson* made clear a moving party "satisfies the requirements of *Batson's* first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred." *Johnson,* 545 U.S. at 170, 125 S.Ct. at 2417. The Court established this relatively low threshold to ease the transition to *Batson's* second step, the party's articulated and ostensibly race-neutral reasons for the challenge, because "[t]he *Batson* framework is designed to produce actual answers to suspicions and inferences that discrimination may have infected the jury selection process .... The inherent uncertainty present in inquiries of discriminatory purpose counsels against engaging in needless and imperfect speculation when a direct answer can be obtained by asking a simple question." *Johnson,* 545 U.S. at 172, 125 S.Ct. at 2418. However, the Supreme Court decided *Johnson* on June 13, 2005, approximately one year after the instant death verdict was returned. Consequently, the district court did not have the benefit of *Johnson's* observation calling for actual answers, and yet, this is the procedure employed by Judge Liljeberg.

In the present case, after the State snuck its second African American female, the defense raised a *Batson* challenge, which the district court denied, finding no pattern of discrimination had been established. However, after the State's next peremptory, the defense renewed its *Batson* challenge, noting "the State has stricken three black females in a row." At that point, the district court looked to the prosecutor, "Why don't you give a reason just for the record." When pressed as to whether the district court was making a finding of a pattern, the court said, "Just to protect the record, I'll say yes, " even though, as noted above, the district court reiterated two of the jurors already chosen were black males. The State then articulated its race-neutral reasons for the three African American females it excused, which the court accepted as race-neutral. After the State struck the fourth African American female "in a row," the defense re-raised *Batson* and interposed a challenge under *JE.B. v. Alabama ex rel. TB.,* 511 U.S. 127, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994), as well. The parties revisited the question of whether a pattern had been established, and the district court put the following reasons on the record:

> I mean, just to clarify the record, you know, in the event that an appeals court would find there was a pattern, I wanted to make sure the State stated its reasons. So, while I did note that the State struck African Americans -- I mean has African Americans on the jury right now, I asked them to explain their reasons out of an abundance of caution. To be consistent, I think it's important that you explain your reasons on this one. And if it requires a finding of a pattern [to] get you to explain them [] then I'll find that.

Furthermore, the district court noted the defense had used five out of six peremptories to strike white males, and so following the State's *reverse-Batson* challenge, the court ordered the defense to give its race and gender-neutral reasons. At the

322, 328-29, 123 S.Ct. 1029, 1035, 154 L.Ed.2d 931 (2003) *(Miller-El* I) ("[I]n light of the parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination.").

For example, defendant points to the following colloquy following the State's explanation for striking Selina Paul as illustrative:

---

conclusion of the defense's articulation, the district court found all of the reasons legitimate, "many of which I have independently noticed myself."

Thereafter, when the State struck a white female, the prosecutor articulated gender-neutral reasons out of an abundance of caution, which the district court accepted as gender-neutral, even though "I don't think I made a finding that there was a sex discrimination in jury selection."

Notwithstanding the judge's apparent half-hearted finding of a pattern in the State's exercise of its peremptory challenges mid-stream in jury selectión, finding the defense met its burden of establishing a prima facie showing under step one of *Batson* is borne out at the conclusion of jury selection. When the first twelve jurors had been chosen, the State used seven out of nine peremptory strikes against black jurors, or roughly 77%, which clearly supports the district judge's finding the defense had established a pattern under *Batson's* first step. *Cf Johnson,* 545 U.S. at 163, 125 S.Ct. at 2413 (because *Batson* did not mean to impose an onerous burden as the first step in its analysis, a defendant need produce only "evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred."). At any rate, because the State gave its race-neutral reasons, and because the district judge then considered the legitimacy of those reasons even at points when he appeared to question whether the defense established a prima facie case of discrimination, *Hernandez* governs the present case.

> THE COURT: Right. There's always neutral reasons that are independently witnessed.
>
> [Defense Counsel]: Judge if I -- I don't mean to cut you off. Can I respond to Mr. Mary's reasons. Judge—
>
> [The State]: Judge, it's not entitled to issue. If you make a finding that [the reasons are] race neutral and sex neutral, he's not entitled to try to traverse.
>
> THE COURT: Right. I made my finding. But so that the record is perfected, go ahead.

Notwithstanding defendant's claims to the contrary, the district court permitted the defense to proffer its reasons countering the State's articulation in not only this instance involving Selina Paul, but in every *Batson* challenge complained of herein, if the defense so chose. In each instance, the district court found the prosecutor's proffered reasons were valid, race and/or gender-neutral, and non-pretextual. The district court voiced reasons, which it independently observed, before finding the State's peremptory strikes were not tainted with a discriminatory purpose. Judge Liljeberg clearly did not truncate the *Batson* inquiry. Accordingly, we find this claim is not supported by the record.

Assignment of Error No. VI

In this assignment of error, defendant avers the State exercised peremptory challenges on the basis of race and gender in violation of *Batson* v. *Kentucky,* 476 U.S. 79, 106S.Ct. 1712, 90 L.Ed.2d 69 (1986) and J.E.B. *v. Alabama ex rel. T.B.,* 511 U.S. 127, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994).[9] Defendant claims, in selecting the first twelve jurors, the State used seven out of nine peremptory strikes to remove African American jurors, *i.e.,* the State used more than 77% of its peremptory strikes to remove black jurors, despite the fact African Americans made up only 27% of the venire.

Ultimately, the jury seated in the instant case was composed of ten white females, one white male, and one black male. The two alternate jurors were both black females. While the presence of one minority juror on the panel does not alone defeat a *Batson* challenge, *see Collier*, 553 So.2d at 819, it remains a relevant circumstance for the court to consider in assessing the prosecutor's overall intent, particularly in a case, which requires a unanimous verdict. *State* v. *Duncan*, 99-2615, p. 27 (La. 10116101),802 So.2d 533,552, *cert. denied*, 536 U.S. 907, 122 S.Ct. 2362, 153 L.Ed.2d 183 (2002). Moreover, a reviewing court owes the district judge's evaluations of discriminatory intent great deference and should not reverse the rulings unless they are clearly erroneous. *State v. Draughn*, 05-1825, p. 21 (La. 1117/07), 950 So.2d 583,600, *cert. denied*, 552 U.S. 1012, 128 S.Ct. 537, 169 L.Ed.2d 377(2007).

---

[9] In *JE.B.,* the Supreme Court extended *Batson* and its progeny to prohibit the exercise of peremptory challenges on the basis of gender. Regardless of whether the challenge is based on race or gender, the same three-step, burden-shifting framework outlined in *Batson* is utilized:

> [O]nce the opponent of a peremptory challenge has made out a prima facie case of racial discrimination (step one), the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation (step two). If a race-neutral explanation is tendered, the trial court must then decide (step three) whether the opponent of the strike has proved purposeful discrimination.

State v. *Duncan,* 99-2615, p. 11 (La. *10116/01), 802* So.2d 533,543 (quoting *Purkett* v. *Elem, 514* U.S. 765, 767, 115 S.Ct. 1769, 1770-71, 131 L.Ed.2d 834,839 (199)), *cert denied,* 536 U.S. 907, 122 S.Ct. 2362, 153 L.Ed.2d 183 (2002).

In the present case, a review of the voir dire record as a whole indicates the State articulated race and gender-neutral reasons for each of the eight challenges about which defendant now complains. The district court considered the prosecutor's articulated reasons, found them all sufficient, and concluded no discriminatory intent tainted the State's exercise of its peremptory challenges. The State's race and gender neutral reasons are addressed below.

A. The State Employed Pretextual Explanations for Striking African American Jurors.[10]

---

[10] This appendix adopts the order of *Batson* challenges as they arose at trial instead of the order presented in defendant's brief.

1. Tammie Ford Frazier b/f

On the first day of voir dire, the district court explained the qualifications for serving as a juror. Tammie Ford Frazier came to the bench and disclosed she had previously been arrested:

> When I was about like -- I was 29 years old, and I was babysitting, and the police came in the house when I was babysitting, and they had drugs in the house, and I went to jail. I just wanted to know if that was a felony or what.

Ms. Frazier indicated "they let everything go," and she was never prosecuted on the drug charge. Thus, that episode did not disqualify her from jury service. Thereafter, Frazier was questioned in Panel 2 of *Witherspoon*[11] voir dire. When the prosecutor noted Frazier had circled both "B" and "D" on her jury questionnaire,[12] which would put her at "opposite ends of the spectrum," he asked her to tell him how she felt about capital punishment. Ms. Frazier indicated, "Well, if I have to, I could impose the death sentence," and she could consider a life sentence as well. Under defense questioning, she reiterated she could consider a life sentence even if the facts involve an intentional killing during an armed robbery. She had no problem with considering all of the mitigating circumstances, including youth.

---

[11] *Witherspoon* v. *Illinois,* 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968).

[12] Each of the prospective jurors was asked to disclose their opinion of capital punishment. Question 31 on the form provided:

> 31) Regarding the death penalty, which of the following statements most accurately represents the way you feel? *(YOU MAY CIRCLE ONE OR MORE THAN ONE OF THE CHOICES)*

---

a) In a case in which the defendant is convicted of first degree murder and in which the death penalty is requested, I will always vote to impose the death penalty.
b) I am strongly in favor of the death penalty, and would have a difficult time voting against it, regardless of the facts of the case.
c) I am generally in favor of the death penalty, but I could base a decision to impose it on facts and the law in the case.
d) I am generally opposed to. the death penalty, but I could base a decision to impose it on facts and the law in the case.
e) I am strongly opposed to the death penalty, and I will have a difficult time voting to impose it, regardless of the facts and the law in the case.
f) I am personally, morally or religiously opposed to the death penalty, and I would never vote to impose it.

At the conclusion of prequalification, neither side moved to strike Frazier for cause.

Ms. Frazier was interviewed in the first round of general voir dire. She admitted to the prosecutor she would like to hear defendant testify, but stated she would not hold it against him if he chose not to testify. She also indicated she could listen to the testimony of police officers and expert witnesses and evaluate their testimony accordingly. Under defense questioning, she disclosed she had a brother, who "did 13 years in prison."

Thereafter, the State issued its first peremptory strike to excuse Frazier, and following the defense *Batson* challenge, the district court sought reasons from the State, which the prosecutor summarized:

> With regard to Ms. Frazier, she also gave conflicting responses. She put Band D on the questionnaire. B is, I'm strongly in favor, and D is, I'm generally opposed. Furthermore, she stated yesterday, if I have to, I will. Not only that, Judge, she wasn't completely honest with us when she was filling out the questionnaire, because on the questionnaire, she neglected to indicate that she herself had been arrested for drugs. I don't feel comfortable. I don't

feel that she is a strong death penalty juror.[13]

The district court accepted the State's reasons for striking Frazier as legitimate. Whatever Frazier's true position on capital punishment, her previous arrest for a drug offense and her brother's incarceration provided race-neutral reasons for the State's peremptory strike. *See State v. Jones,* 98-0842, pp. 8-9 (La. App. 5 Cir. 211 0/99), 729 So.2d 57, 62 (venireman had an arrest record). This Court has considered the fact a family member is a convicted criminal a racially-neutral reason for excluding a prospective juror. *See State* v. *Tilley,* 99-0569, p. 6 (La. 7/6/00), 767 So.2d 6, 14 (one venire woman had two sons with felony convictions), *cert. denied,* 532 U.S. 959, 121 S.Ct.1488, 149L.Ed.2d375 *(2001); State v. Lindsey,* 543 So.2d 886 (La.1989), *cert. denied,* 494 U.S. 1074, 110 S.Ct. 1796, 108 L.Ed.2d 798 (1990); *see also State* v. *Otis,* 586 So.2d 595,602 (La. App. 2d Cir. 1991), *writ granted on other grounds,* 589 So.2d 487 (La. 1991), *appeal after remand,* 592 So.2d 1 (La. App. 2d Cir.1991)(veniremen had relatives with criminal records). Federal courts have also approved race-neutral challenges of prospective jurors, whose family members have been in trouble with the law. *See United States* v. *Yankton,* 986 F.2d 1225, 1231 (8th Cir. 1993)(venireman's brother had criminal record). Under these circumstances, we find the State's peremptory strike of Frazier withstands *Batson* scrutiny.

---

[13] Ms. Frazier's jury questionnaire indicates she has a tenth grade education and had been laid off from work when she completed the questionnaire. She responded she had previously been a defense witness in a criminal prosecution in Jefferson Parish. Regarding the question, which asked if she or any member of her family or close friend had ever been convicted of a crime, Frazier responded, "Yes." In response to what the crimes were, she put, "all kinda things."

2. Pamela Parker *b/f*

Pamela Parker was also questioned in Panel 2 of *Witherspoon* voir dire. At the outset, she confirmed to the prosecutor she had circled "D" on her jury questionnaire and she could consider both life and death, including all the mitigating evidence.

During general voir dire, Parker was questioned in Panel 1, and she informed the prosecutor she would have a problem with snitch testimony "because I think they're giving up something to gain something. I have a problem believing their testimony, and I have a problem not hearing from the defendant, because I too would be screaming from the rafters if I were innocent." Under defense questioning, she asked to approach the bench and the following colloquy ensued:

> MS. PARKER: I'm sorry. My daughter's graduating Friday from LSU getting her master's degree. I just wanted that to be a part of the record In case my name came up.
>
> THE COURT: Okay. If you're forced to miss it, we're probably at a point now—

MS. PARKER: I know. I know. I know. But I just wanted it to be a part of the record that I asked.

THE COURT: Alright. Thank you for asking. Let me ask you just to make sure. If you were selected and were here Friday morning, and you probably will be -- ... would you A) hold it against any of the parties that forced you to be here?

MS. PARKER: No.

THE COURT: Or B) would your mind be in Baton Rouge and your body would be here --

MS. PARKER: Probably.

THE COURT: So, you don't think you could concentrate on the case?

MS. PARKER: No -- I mean, I would be, but I wanted--

THE COURT: You'd be disappointed?

MS. PARKER: Yeah, right, right.

THE COURT: But you think you'd be able to concentrate?

MS. PARKER: Right, right.

Even under defense questioning, Parker persisted in wanting to hear defendant. Ultimately, after much rehabilitation from defense counsel and the district court, Ms. Parker acquiesced: "I would not hold it against him if he did not testify."Still, her lesser opinion of snitch testimony did not waver:

> I think they're concerned about their life on the line. So, they're going to be questionable. Their testimony would be questionable to me, because they knew -- beforehand they knew what was going to happen. So, now they're going to get their neck out of the noose. So, they're going to say what they need to, to do that.

The prosecutor issued a challenge for cause against Ms. Parker:

> [The State]: [S]he says, verbatim, the snitch is just going to say what they have to say to get out of it. Now, that's entirely consistent with what she told me when I was going over that, Judge.... [I]n regard to the snitch testimony. She's got a problem with it....
>
> THE COURT: She's got a daughter whose got a graduation in Baton Rouge, so she doesn't want to be here....
>
> [The State]: And then, Judge, she's got a Fifth Amendment problem. Mr.

> Faulkner [defense counsel] questioned her and the Court questioned her with regard to the Fifth Amendment with regard to the defendant testifying.... She wanted to hear the defendant testify, and in lieu of that, she wanted him to put on witnesses. She required them to put on a case....
>
> The Court: Alright. Denied....

After the district court denied the State's cause challenge, the State issued its second peremptory strike against Ms. Parker and gave the following reasons on the record:

> [The State]: Ms. Parker -- I would like to put these on the record. Ms. Parker, during the initial phase of my voir dire of these jurors was sleeping. She was sleeping. On top of that, she is week [sic] on the death penalty. Second of all, she had concerns about the Fifth Amendment. She had problems with snitch witnesses. She had a problem with requiring the defense to put on and call witnesses. Furthermore, she explained that she had her daughter's graduation from college and that she would rather be there.
>
> ***
>
> [Defense Counsel]: With regards to Ms. Parker -- the fact that she may have

circled B and D on her questionnaire, I mean, she's come in here and she's basically said that she could consider both life and death in this matter. The Court spoke to her relative to her position on needing to hear from the defendant and snitch testimony. Mr. Mary [prosecutor] tried to have her stricken for cause. The Court denied that, because, in my opinion, believed that the lady fully understands and has answered properly. She should serve on this particular jury. I don't know if Mr. Mary said that Ms. Frazier was sleeping or Ms. Parker was sleeping --

[The State]: Ms. Parker was sleeping.

[Defense Counsel]: That never came to my attention. I don't know if the Court saw it, because the Court never admonished her for sleeping and Mr. Mary never put anything on the record relative to this young lady sleeping in Court. I have no knowledge of that. I don't think any of the reasons stated are proper reasons to exclude her from serving on this jury....

THE COURT: Alright. I think the reasons are race neutral reasons that the court did observe on its own.

Judge Liljeberg confirmed he concurred with the State's race-neutral reasons and had independently observed the same. *Cf. Thaler v. Haynes,* _ U.S._, 130 S.Ct. 1171 (2010)(rejecting the argument *Batson, Snyder,* and their progeny established a rule demeanor-based explanations for peremptory challenges must be rejected unless the judge personally observed and recalled the relevant aspect of the prospective juror's demeanor). At any rate, viewing Parker's voir dire responses as a whole, the State's proffered reasons for striking her for cause given her bias against listening to snitch testimony[14] and reluctance to accord the defendant the presumption of innocence under the Fifth Amendment could have supported a valid cause challenge under La. Code Crim. Proc. art. 797(2) and (4), namely, "[t]he juror is not impartial, whatever the cause of his partiality," and" [t]he juror will not accept the law as given to him by the court," respectively. The fact Judge Liljeberg denied the State's cause challenge appears more concerned with Parker's stated preference of attending her daughter's graduation rather than serve on a sequestered capital jury. Nevertheless, Parker's candid assessment missing her daughter's graduation would be a distraction and a disappointment is a neutral justification for the State's peremptory challenge, and we find no abuse of the district court's discretion in denying the *Batson* challenge against Parker.

---

[14] The State's case relied in part on the "snitch" testimony of Troy Arnaud, who had originally been charged in this matter with second-degree murder. Mr. Arnaud accepted a plea agreement with the State to plead guilty to the reduced charge of accessory after the fact of first degree murder in exchange for his truthful testimony against defendant and Kellen Parker, and a sentence of five years imprisonment at hard labor.

3. Jakeitha Patterson *b/f*

Jakeitha Patterson was questioned in the second panel of *Witherspoon* voir dire. At the outset, Ms. Patterson expressed a preference toward life imprisonment in her opening colloquy with the prosecutor:

> [The State]: Ms. Patterson, you circled E, which is strongly opposed to the death penalty and would have a difficult time imposing it.
>
> MS. PATTERSON: Yes....
>
> ***
>
> [M]y true feelings about the death penalty would be I'm more lenient towards mercy, but depending on the circumstances, what's presented to me, I think I could make a decision.

Under defense questioning, she fortified her position she could consider both life and death as appropriate sentences. Neither side challenged Patterson in the prequalification round, and she was questioned in Panel I of general voir dire. She confessed she had a problem with defendant not wanting to speak up on his own behalf:

> MS. PATTERSON: Just generally speaking, I feel that anyone can say anything about me, but if it gets to the

> point where it's logical and rational, then I feel the need to defend myself, and so to speak, set the record straight, if it goes against my standards and my morals.
>
> [The State]: Okay. I guess my -- the big question is, would you hold it against him if either he elected not [to] testify, and then he chose not to put on any witnesses?
>
> MS. PATTERSON: I would have a problem with it, but I wouldn't hold it against him.

Thereafter, Ms. Patterson admitted to the prosecutor she had not been truthful in completing her jury questionnaire:

> MS. PATTERSON: Can I ask what was marked? What did I put? Because I was trying to get out of jury duty in all honesty. I really was. But that's not my -- if you say that I put that--
>
> ***
>
> Yeah, and my apologies to the court for that. That's not my feelings on the death penalty, what I marked.
>
> [The State]: I guess the question I'm asking you is, do you think that you -- what are your feelings? Do you think that you could truly consider both --

MS. PATTERSON: Yes, I could.

[The State]: -- or do you lean one way or the other?

MS. PATTERSON: Like I said before on Monday, I myself am more lenient towards mercy because that's the type of heart that I have.

[The State]: Okay.

MS. PATTERSON: But void of emotions, I'm as if it was my mother, or my brother, or something like that. Of course, you would want to avenge that. But yes, I could consider, yeah.

[The State]: And your leaning towards mercy is not so far --

MS. PATTERSON: No.

[The State]: -- that it would impair your ability to really consider --

MS. PATTERSON: No.

[The State]: -- what the appropriate sentence would be?

MS. PATTERSON: No.

To defense counsel, she completely moderated her previous position and averred she had no problem if defendant did not take the stand, because

"I just have the reference point that even Jesus stood silent in front of his accusers."

During the selection session, Ms. Patterson became the State's third peremptory challenge, prompting the following exchange:

> [The State]: There's an indication on her questionnaire that she is weak in regards to the death penalty. Twice now, twice today, she said [] that she leans to mercy. She could consider it but it was after much pain and difficulty questioning about everything. Yeah, I can consider it. I can consider it. I'm actually more towards the middle. And then her last statement, which gives me cause with regard to her ability to give serious consideration in possibly imposing a death sentence, is that even Jesus stood silent to his accusers. --

* * *

> [Defense Counsel]: Ms. Patterson's response with regard to the Jesus comment was in response to me asking her whether or not she needs to hear from the defendant. That in no way disqualifies her from serving as a juror. She said that she did not need to hear from the defendant in this particular matter. All of the other reasons, Judge, relative to her leaning towards life, that

> doesn't disqualify her as serving as a juror in this particular matter. She said the magic language that everybody's been looking for that she could properly consider both life and death, and the Court, Mr. Mary and I have instructed them, you know, that they could lean one way or the other, it does not matter. She said she leans towards life, that should not be a problem. That should not automatically disqualify her from....

The district court accepted the State's reasons as race-neutral. Indeed, Ms. Patterson's views on capital punishment constituted a legitimate race-neutral concern. *State v. Williams,* 96-1023, p. 33 (La. 1/21/98), 708 So.2d 703, 727 (state's assertion juror appeared "weak, scary and shaky on the death penalty" accepted as race-neutral reason), *cert. denied,* 525 U.S. 838, 119 S.Ct. 99,142 L.Ed.2d 79 (1998). We find no relief is due in this part.

4. Selina Paul *b/f*

Selina Paul was questioned in the third panel of *Witherspoon* voir dire. Ms. Paul acknowledged she circled "D" on her jury questionnaire, indicating she is generally opposed to the death penalty, but could vote to impose it depending on the facts and circumstances. She could also listen to all the mitigation evidence, and even if no such evidence was presented, she would rely on the catchall provision of La. Code Crim. Proc. art. 905.5(h)(any other relevant mitigating circumstance).

Ms. Paul was interviewed in the second panel of general voir dire. During State questioning, her rambling answer seemed to suggest she was having difficulty grasping the concept of alcohol intoxication as negating specific intent:

> Well, I would believe it was intent if you had alcohol and you were to a point where you did know what you was doing, I don't think you would do something in that manner in the procedure that it was done. So, I would call it intent.

However, Ms. Paul seemed comfortable with the State's burden as beyond a reasonable doubt. Concerning defendant's Fifth Amendment privilege, Ms. Paul stated she could respect defendant's rights. When defense counsel questioned Ms. Paul on jury unanimity and whether she would stick to her decision, she replied:

> MS. PAUL: I think I would try to find out why the other people voted the way they did. Maybe there was something that I missed out on. So, I would try to go back to them and try to find out, and from that I would probably be able to make a more conscious decision.
>
> [Defense Counsel]: You can be persuaded if it's a legitimate argument?
>
> MS. PAUL: I think so.

Ms. Paul became the State's fourth peremptory challenge, and the prosecutor gave the following reasons for striking her:

> With regard to Ms. Paul, Judge, she circled "D" on the questionnaire, and that question -- I mean that response is, "I am generally opposed to the death penalty." In response to questioning by defense counsel yesterday, during the *Witherspoon* process, she answered definitely, and this answer was emphatic, definitely, I cannot consider mercy, when they were going through the mitigating circumstances.[15] Furthermore, when I was giving the examples in .my voir dire, she seemed to be confused with regard to intoxication and specific intent. After questioning her again, I had some concerns with whether or not she understood the law with regard to intoxication and specific intent. Furthermore, Paul Fleming [defense

---

[15] While Selina Paul seemed to have difficulty grasping some of the legal concepts conveyed in voir dire, a review of her voir dire responses as a whole does not indicate she "emphatically" told either side she could not consider mercy, as the prosecutor stated in his reasons. Admittedly, the State gave four articulations in a row, and it appears the State may have confused this juror's responses with those of another. At any rate, even assuming Ms. Paul did not oppose mercy, as the prosecutor articulated, the remaining reasons provided support for the race-neutral reasons in excusing her from the jury.

> counsel] was questioning her in this last panel. She volunteered information. Not once during my voir dire or any other questioning that I asked her, did she volunteer any information.

The district court accepted the State's reasons as legitimate. Indeed, the prosecutor's perception of Ms. Paul favoring defense questioning over the State's has been found to satisfy the criteria for race neutrality set out in Louisiana jurisprudence. *See State* v. *Jones,* 596 So.2d 1360, 1368 (La. App. 1st Cir.)(venireman ignored prosecutor, but "perked up" during defense counsel's voir dire), *writ denied,* 598 So.2d 373 (La. 1992); *see also State* v. *Mamon,* 26,337 (La. App. 2 Cir. 12/16/94), 648 So.2d 1347(veniremen were young, knew defendant, had relatives on police force, or demonstrated friendliness towards defense counsel), *writ denied, 95-0220* (La. 6/2/95), 654 So.2d 1104; *State* v. *Aubrey,* 609 So.2d 1183, 1187 (La. App. 3d Cir. 1992) (venire woman maintained excessive eye contact with one defendant). We find no relief under *Batson* is due in this part.

5. Robert Ratcliff *b/m*

Robert Ratcliff was questioned in the third panel of *Witherspoon* voir dire. Mr. Ratcliff acknowledged to the prosecutor he circled "D" on his jury questionnaire, but could consider imposing both sentences. He also assured the prosecutor he would consider all mitigation evidence. Without any questions by the defense in. the prequalification round, Mr. Ratcliff advanced to general voir dire, where he was questioned in the second panel.

Mr. Ratcliff expressed a misunderstanding about the relative burdens in a capital trial:

> MR. RATCLIFF: I think it should be a level playing field. I think that the defense should have equal burden of proving their client innocent as well.
>
> * * *
>
> [The State]: Okay. And answer the State's case? Am I correct, that they should be required under the law to answer the charges and present a case? Or call the defendant?
>
> MR. RATCLIFF: I know the defense would have to -- he has the right not to get on the stand and protect himself. I understand that that's his right. But I also believe that the defense should have some, you know –should carry some of the burden to prove their client innocent.

Thereafter, Mr. Ratcliff assured the State he would not hold it against defendant if he exercised his right not to testify. However, Mr. Ratcliff did not veer far from his original refrain under defense questioning:

> MR. RATCLIFF: I wouldn't hold it against him, but I still feel that the defense should step up and discredit the

State's evidence. That's just the way I feel about that.

[Defense Counsel]: Is part of .that feeling, I believe you were previously in law enforcement.

MR. RATCLIFF: Yes, sir.

[Defense Counsel]: With the Orleans Parish Criminal Sheriffs Office?

MR. RATCLIFF: Yes, sir.

[Defense Counsel]: I guess, does that -- your former position help you form the basis?

MR. RATCLIFF: No, not at all.

[Defense Counsel]: Not at all?

MR. RATCLIFF: No, not at all. It's just my personal opinion.

[Defense Counsel]: Might I ask your position with the Sheriffs Office?

MR. RATCLIFF: I was a jailer.. I worked inside OPP.

* * *

[Defense Counsel]: And you are a deacon in the church?

MR. RATCLIFF: Yes, I am.

> [Defense Counsel]: What church would that be?
>
> MR. RATCLIFF: Jesus is Lord Evangelistic Ministries.
>
> [Defense Counsel]: Thank you. Again, I hate to pry. I'm not trying to be too personal.
>
> MR. RATCLIFF: It's no problem. I have no problem with professing that. No problem at all.

During the selection session, the State moved to excuse Robert Ratcliff for cause and gave the following reasons:

> I'm moving to strike him for cause. He said, 1) the defendant must have done something in order to be here. Second of all, he said, very clearly and unequivocally that the defense should step up and discredit the State's case. So, I have some concerns.

The district court denied the State's cause challenge, recalling Mr. Ratcliff said he could be fair and not penalize anybody. Thereafter, the State exercised its sixth peremptory challenge to remove Ratcliff and its fifth strike against an African American prospective juror. The prosecutor gave the following articulation of reasons:

> I'm striking Mr. Ratcliff, 1) because he did give me responses of some concern,

week (sic) on the death penalty. Second of all, he is a deacon in his church....

***

During his questioning, he reflects that he works with kids in the Jefferson Parish School System, Judge. Both Mr. Rowan [prosecutor] and I got the impression that he would be sympathetic to the defendant, given that the defendant is a young male. And by all indications, the defense is going one, intoxication in guilt; two, they've put everybody on notice through voir dire that they intend to bring intoxication and mental defect in at the penalty phase. Given this position with regard to one being a deacon and highly involved with children, we think that he's week (sic) on the death penalty because he's going to be more into rehabilitation than he would be able to punish. Third, Your Honor, when Paul [defense counsel] asked him what church he was a deacon in, he said Jesus is Lord Evangelical Ministries. Such churches opt to seek out at risk people.

***

And try to work with them and try to convert them to their faith and bring them into their fold. For all these

> reasons, we think that it's highly likely that he won't vote for the death penalty. And then on top of that, his response to the Fifth Amendment, he had a problem in potentially following the law.

The defense objected to the State striking Mr. Ratcliff based on his religious beliefs. Counsel also objected the State's reasons for cause were clearly "pro defense," whereas his reasons in support of the peremptory strike were "pro State," dubbed by appellate counsel as a "brazen reversal of logic." The district court disagreed with defense counsel:

> Let me rule on it then if you feel like you need to respond, you can respond. First of all, I don't think he's made a challenge based on religious beliefs. He's made a challenge based on the church's practices of rehabilitating people, and not punishment. That's not a religious belief, it's more admonishment, okay, number one. Number two, I think all of the reasons the State has given are race neutral. The Court has independently witnessed every one of them, and although some – and I find that the reasons given by the State were -- some were pro -- if you want to call them pro defense, some were pro State, but I think – the truth is that they're all valid reasons why he may not be a good juror.

As an initial matter, Ratcliff's former employment as a jailer with the Orleans Parish Criminal Sheriffs Office does not disqualify him from serving as there is no "per se bar to members of law enforcement serving as criminal jurors. In *State v. Ballard,* 98-2198 (La. 10119/99), 747 So.2d 1077, this Court unanimously overruled *State v. Simmons,* 390 So.2d 1317 (La. 1980),[16] holding, if a law enforcement officer indicates during voir dire he could be an impartial juror, the trial court has the discretion to determine whether or not a cause challenge is warranted. This Court reasoned disqualification of all police officers actively engaged in the field from serving on a jury disregards' whether the judge accepts the officer as a fair and impartial juror. *Id.* This Court has otherwise long held mere association with law enforcement personnel does not provide grounds for a cause challenge. *See, e.g., State v. Comeaux,* 514 So.2d 84, 95 (La. 1987)(civilian employee working as a police dispatcher not disqualified to serve); *State v. Chapman,* 410 So.2d 689, 711 (La. 1981) (retired jailer not disqualified from service in a criminal case because he was a custodian and administrator and not engaged in active law enforcement).

---

[16] In *Simmons,* this Court broadly held "an actively employed criminal deputy sheriff is not a competent criminal juror." *Simmons,* 390 So .2d at 1318. The *Simmons* Court further noted "[t]he guarantee of an impartial trial in Article 1, Section 16, of the Louisiana Constitution of 1974 is offended by the presence on a jury of a badge-wearing law enforcement officer." *Id.* Following *Simmons,* however, courts of appeal limited its holding and carved out exceptions for law enforcement personnel not actively engaged in the field making arrests and enforcing the law. *See, e.g., State v. Valentine,* 464 So.2d 1091, 1095 (La. App. 1st Cir.)(correctional officer for DOC in St. Gabriel Prison for Women not incompetent to serve although she also had four first cousins, who worked for the sheriff in East Baton Rouge Parish), *writ denied,* 468 So.2d 572 (La. 1985); *State v. Henderson,* 566 So.2d 1098, 1103-04 (La. App. 2d Cir. 1990)(field sergeant at Wade Correctional Institute was competent to serve).

In any event, the prosecutor's perception Ratcliff would be weak on the death penalty given he works with disadvantaged youths is certainly a legitimate race-neutral reason for excusing him. *State v. Williams,* 96-1023, p. 33 (La. 1121198), 708 So.2d 703, 727 (state's assertion juror appeared "weak, scary and shaky on the death penalty" accepted as race-neutral reason), *cert. denied,* 525 U.S. 838, 119 S.Ct. 99, 142 L.Ed.2d 79 (1998).

Finally, for the first time in brief, appellate counsel faults the State for using gender-specific language in his articulation for challenging Ratcliff, specifically "he would be sympathetic to the defendant, given that the defendant is a young male. This claim, however, is not properly before this Court. La.S.Ct.R. X, § 4(3)(b); *see United States v. Williams,* 504 U.S. 36,40, 112 S.Ct. 1735, 1738, 118 L.Ed.2d 352 (1992)(Supreme Court's "traditional rule ... precludes a grant of certiorari" when issue neither "pressed [n]or passed upon below."); *Segura v. Frank,* 93-1271 (La.1114/94),630 So.2d 714, 725 ("[A]ppellate courts will not consider issues raised for the first time on appeal."), *cert. denied,* 511 U.S. 1142, 114 S.Ct. 2165, 128 L.Ed.2d 887 (1994). Accordingly, we find no *Batson* violation in the State's peremptory challenge of Robert Ratcliff.

6. GeJoan Johnson Garrett *h/f*

Gejoan Johnson Garrett was questioned in Panel 3 of *Witherspoon* voir dire. She assured the prosecutor, even though she circled "D" on her jury questionnaire, she could give meaningful consideration to both sentences and would also consider all the mitigating evidence. Without a single question by defense counsel in prequalification, Ms. Garrett advanced to general voir dire, Panel 2, at which time she conceded to the prosecutor she believes the State should be held to a higher burden "because it's dealing with someone's life.... they should have to prove more." However, after clarification by the district court and then hearing a few of her fellow venire members' responses, she moderated her view and assured the prosecutors she would not require more from them. Ms. Garrett expressed an interest in snitch testimony. She further acknowledged she would respect defendant's Fifth Amendment privilege, although she "would be curious." Under defense questioning, she assured counsel she would" stick with my decision" and not change her vote just to go along.

After issuing its seventh peremptory challenge to excuse Garrett, the State gave the following reasons:

> Judge, in response to my questioning with regard to burden of proof. She said, that given this was a death

> penalty case, would require the State to a higher burden -- that during my voir dire with regard ... to what level she's going to require the State to go to. She indicates [on her jury questionnaire] that her hobbies are devotion. Again, give [sic] that she appears to be a highly religious person, and it doesn't matter what her denominational religion is, it troubles me that she would be not inclined to vote for the death penalty. Furthermore, she circled "D" on the questionnaire, which indicates that she may be very week [sic] for the death penalty. Additionally, she was a volunteer at the Belle Chasse State School. That is a State school for the mentally handicapped and retarded children. Given that the defense has indicated and there's been indication now for some time, that the defense intends to introduce evidence of mental defect or disease ... I've got very real concerns that Ms. Garrett would be very sympathetic to a pleading to spare this defendant's life on the basis of some mental defect, given her experience in working with the handicapped ... at the State school in Belle Chasse.

The district court agreed with the State's reasons, given "she's inclined to hold y'all to a higher burden of proof is good enough in my mind." La. Code Crim. Proc. art. 797(4)(juror will not accept the law as given by the court); *see State v. Williams,* 96-1023, p. 33 (La. 1121198), 708 So.2d 703, 727 (state's assertion juror appeared "weak, scary and shaky on the death penalty" accepted as race-neutral reason), *cert. denied,* 525 U.S. 838, 119 S.Ct. 99, 142 L.Ed.2d 79 (1998). Nothing in the prosecutor's reasons for striking Garrett support any inference of a discriminatory purpose. Therefore, we find no relief is due in this part.

7. **Joseph Woods, Sr.** *b/m*

Joseph Woods was questioned in Panel 3 of *Witherspoon* voir dire. Woods circled both ".C" and "D" on his jury questionnaire, leading the State to comment he was "right down the middle." Woods assured he could consider both sentences and he could also consider the mitigating circumstances. The defense posed no questions of Woods during prequalification, and he advanced to Panel 2 of general voir dire. Woods expressed acceptance of the State's burden of proof. When asked if he would like to hear defendant testify, Woods candidly offered:

> Yeah, I would.... I have a son about his age, old like he is. I know I like my son. I'm pretty sure other people like their son too.

Mr. Woods affirmed he would not hold it against defendant if he chose not to take the stand. He further claimed he would not automatically believe a witness just because the person was called by the State.

As its eighth peremptory challenge, the State excused Mr. Woods, prompting the following reasons on the record:

> Judge, when talking about the Fifth Amendment privilege, and his response to my question was -- we're talking about whether or not the defense decides to present evidence and/or whether or not he would require the defendant to testify. He said, I have a son that is right about the defendant's age, and we've got some real concerns there. We feel that he would be highly sympathetic to the defendant given that the defendant is approximately the same age as his son. Furthermore, for similar reasons given by the defense in striking Mr. Bums from the first panel, his language, he might not hold it against him, but -- and I think that eventually -- I've got some concerns. The greater concern is that he might identify with the defendant. He also circled D -- he also circled C, which puts him right in the middle.

The district court found the State's reasons legitimate. The proffered reasons easily satisfy the criteria for race neutrality set out in Louisiana jurisprudence. *State v. Otis,* 586 So.2d 595, 602 (La. App. 2d Cir.)(veniremen had grandchildren the same age as defendant), *writ granted on other grounds,* 589 So.2d 487 (La. 1991), *appeal after remand,* 592

So.2d 1 (La. App. 2dCir.1991). We find no relief is warranted for striking Joseph Woods.

8. Gemayel Holloway (alternate strike) *b/m*

Gemayel Holloway was questioned in Panel 4 of *Witherspoon* voir dire. Mr. Holloway circled "C" on his jury questionnaire, which the prosecutor labeled as "middle of the road." He confirmed he could consider both sentences and all of the mitigating evidence, including the catchall any other relevant mitigating circumstance under La. Code Crim. Proc. art. 905.5(h). The defense posed no questions of Holloway during pre-qualification, and he advanced to Panel 2 in general voir dire.

When asked by the prosecutor his feelings about the burden of proof, Holloway responded: "I think that the State should be held to a higher burden of proof, especially in a capital murder case. That's what I believe." After the prosecutor explained the State's burden of proof in a criminal case is beyond a reasonable doubt, Holloway answered, "Well, in that case, I would say a little more. I would need a little more evidence for the burden of proof." After another venireman indicated he too would place a higher burden on the State, the prosecutor asked for a show of hands as to anyone who felt the same way, and Mr. Holloway raised his hand affirming he maintained his earlier opinion. Whether Holloway would require the defendant to testify would depend on his perceived strength of the State's case. If the evidence was overwhelming, Holloway would want to hear defendant's side, but if the State did an "alright job," then he would excuse the defendant from testifying. However, Holloway then stated he would not hold it against defendant if he chose not to testify or put on any case, but he "would like that." Mr. Holloway expressed some hesitancy on convicting a capital defendant on a case founded in part on circumstantial evidence.

Under defense questioning, Mr. Holloway seemingly grasped the correct burden and stated he had misunderstood the question earlier because he "wouldn't hold the State to a higher burden of proof on the first phase." Holloway continued to express a preference for the defense to put on a case, especially if the State presents a strong case, but he added he could still follow the law as given by the judge.

During the selection session, the State issued a challenge for cause against Gemayel Holloway:

> [The State]: Mr. Holloway very clearly stated, after this court attempted to rehab him and after Mr. Fleming spent an inordinate amount of time trying to rehab him, he said, whether or not he would require the defendant to put on a case and call any witnesses and/or testify, would be determined by the strength of the State's case.
>
> THE COURT: I think he was sufficiently rehabed [sic].... I'm going to deny that one.

Thereafter, the twelfth juror was selected, and the district court granted each side two peremptory strikes in the selection of two alternates. As its second peremptory strike during alternate selection, the State excused Holloway and then gave the following reasons:

> With regard to Mr. Holloway, as the Court is well aware, I previously attempted to strike Mr. Holloway for cause. His -- in the questioning in the regard of a higher burden of proof, he initially said, yes. There was some confusion and then he said, that's my opinion. Well, his opinion is what's going to go into his actions in this case. The State is concerned that if push came to shove that he would require the State to a higher burden. Additionally, in responding to the defense's questions and to the State's questions with regard to the defendant's Fifth Amendment, he said that if the State's case was strong, he would then require the defense to produce -- I mean come up with a defense. The State is of the position that his opinion would cause us concern.

The district court accepted the State's reasons as race and gender-neutral. Under these circumstances, we find the State's peremptory strike of Holloway withstands *Batson* scrutiny. La. Code Crim. Proc. art. 797 (4)(juror will not accept the law as given by the court).

Reviewing the voir dire record as a whole, we find the State articulated race-neutral reasons for each of the eight challenges about which defendant now complains. The district court maintained its pivotal role in the jury selection process, "and no abuse of its discretion is detected. Furthermore, we find no discriminatory intent pervaded the State's exercise of its peremptory challenges, and therefore, no *Batson* violation tainted jury selection in this case.

B. A Cumulative Assessment of the Prosecutor's Conduct Bolsters the Inference Race Discrimination Infiltrated the Jury Selection Process.

1. The State's challenges for cause bolster the inference discrimination based upon race infiltrated the process.

In this sub-part, defendant complains, after death-qualification, the State exercised zero challenges for cause against white prospective jurors and three against African American prospective-jurors: Pamela Parker, Robert Ratcliff and Gemayel Holloway. However, the entirety of the voir dire responses of those three venire members was analyzed completely in sub-part A, *supra,* and nothing additional can be addressed here. No further consideration of this sub-part is warranted.

2. Throughout voir dire, the State treated similarly situated African American and white jurors differently.

In this sub-part, defendant complains the State permitted the district court to excuse African American jurors, who expressed a hardship, whereas it resisted excusing white jurors with similar requests. For comparison, defendant focuses on the treatment of Rodney Preatto and Peter Rigby, both of whom came on the first day of jury selection when the district court entertained hardship excuses from the entire venire.

Defense counsel voiced no objection when these jurors were under consideration, and thus, this claim was not preserved for appellate review. La. Code Crim. Proc. art. 841; *State v. Wessinger*, 98-1234,p. 19 (La. 5/28/99),736 So.2d 162, 180[17] (scope of review in capital cases is limited to alleged errors contemporaneously objected to), *cert. denied*, 528 U.S. 1050, 102 S.Ct. 589,145 L.Ed.2d489 (1999). No further consideration of this sub-part is warranted.

3. The State's manner of questioning prospective African American jurors often diverged from its approach with prospective white jurors.

In this sub-part, defendant avers the prosecutor posed questions differently to African American venire member than he did when questioning white prospective jurors, an approach which counsel claims would "trap" the black jurors into generating grounds for a subsequent State peremptory strike. *See Miller-El v. Dretke,* 545 U.S. 231, 255, 125 S.Ct. 2317, 2333-34, 162 L.Ed.2d 196 (2005)("[C]ontrasting *voir dire* questions posed respectively to black and nonblack panel members" constitutes "evidence that prosecutors more often wanted blacks off the jury, absent some neutral and extenuating explanation."); *State v. Green,* 94-0887, p. 24 (La. 5/22/95), 655 So.2d 272, 288 (holding the sole focus of the *Batson* inquiry is upon the intent of the prosecutor at the time he exercised his peremptory strikes; outlining several factors, which could lead to a determination of discriminatory intent, including" statements or actions of the prosecutor which support an inference that the exercise of peremptory strikes was motivated by impermissible considerations").

---

[17] Superceded by statute on other grounds as stated in. *State v. Gomez*, 00-0566 (La. 1/17/01), 778 So.2d 549.

Defendant invites this Court to compare the voir dire colloquies of Jakeitha Patterson, an African American venire member, who opposed capital punishment, and Wandy Dollete, a white prospective juror, who also opposed the death penalty. Patterson's voir dire responses as a whole were addressed exhaustively in sub-part A, *supra,* and thus, will not be reproduced here. The State used its third peremptory challenge to excuse Ms. Patterson based on her views against the death penalty.

As for Wandy Dollete, she was questioned in the first *Witherspoon* panel. She admitted to the State she circled "F" on her jury questionnaire, indicating she would never vote to impose the death penalty and she based this belief on her personal views. After establishing that unequivocal position, the prosecutor posed no further questions. Curiously, under defense questioning, Ms. Dollete reported she could consider both life and death. During the selection session, the State was baffled by Dollete's change of heart, given her conflicting responses, and the district court called her to the bench for additional questioning:

> MS. DOLLETE: Why I changed my answer.... I think that I could consider it. It would be very difficult to say that I would do it, but he said consider everything.
>
> THE COURT: Alright. So, you're not so fundamentally opposed to the death penalty that you –
>
> MS. DOLLETE: It would be very difficult to say the death penalty, but I would definitely consider it.
>
> THE COURT: Okay. In other words, you can envision a scenario where a crime was so heinous and there's a lack of mitigating evidence that you could vote to impose the death penalty?
>
> MS. DOLLETE: Right, like my child. You know what I mean? Yeah. But like if you think of that the other way, there's family involved and -- I don't know.

> THE COURT: Obviously, you wouldn't be sitting on your child's [case] as a Juror.
>
> MS. DOLLETE: Right, right.
>
> THE COURT: But you think that you could, under a certain set of circumstances, vote in favor of the death penalty?
>
> MS. DOLLETE: Right.

Based on her colloquy with the district court, Ms. Dollete proceeded to general voir dire and was questioned in the first panel, during which the prosecutor re-examined her stance on capital punishment:

> [The State]: Ms. Dollete, how about you? Did you have an opportunity to think long and hard of the inquisition that we put you through the other day?
>
> MS. DOLLETE: I feel sick to my stomach right now.
>
> [The State]: I understand. Like I said, this is not an easy process, and it's not easy for us to do. Do you think that given your feelings with regard to the death penalty, do you think that they would impair your ability to return a verdict of guilty as charged?
>
> MS. DOLLETE: Yes.

> [The State]: And that doesn't have anything to do with whether or not -- that's even for voting guilty as charged, knowing that you would then be placed in that situation for the second phase, correct?
>
> MS. DOLLETE: I think so, yes.
>
> [The State]: Having reflected on the responses now for two nights, at least, do you feel that, if you were selected and placed in that situation, and were convinced and actually voted guilty, could you even give any real consideration, more so than just lip service, to the death sentence as an option?
>
> MS. DOLLETE: After thinking about it. I don't think I can.[18]

Thereafter, the State issued a challenge for cause, and defense counsel stated, "No objection."

---

[18] Appellate counsel makes an oblique attempt to distinguish treatment by races through the prosecutor's questioning on the Fifth Amendment and insinuates the prosecutor somehow queried white jurors, who expressed a desire to hear defendant testify, into accepting that fact, whereas he led black jurors to respond in terms that would support a cause challenge, such as "holding it against the defendant if he elected not to testify." However, the examples drawn in support of this claim, when read in context, do not bear out counsel's premise. Rather, they demonstrate jurors will express their true feelings regardless of how the inquiry is framed.

Nothing presented in these two voir dire colloquies demonstrates a prejudicial approach or questioning aimed at "trapping" the responder. Instead, the State's obvious goal was to ferret out pro-life jurors, regardless of their race.[19] On the jury questionnaire, Patterson had circled "E" and Dollete had circled "F." Both were excused on the basis they opposed capital punishment and on that basis alone. We find no disparate treatment can be gleaned in this sub-part and no relief is due.

C. The Trial Court Refused to Consider a Significant History of Race Discrimination.

In this sub-part, defendant attempts to support his claim a history of race discrimination permeated jury selection in Jefferson Parish by complaining the district court denied his motion for new trial based on the denial of defendant's *Batson* challenges.[20] Attached as Exhibit A to defendant's motion for new trial is a document entitled "Blackstrikes" taken from the web site, www.blackstrikes.com. At the hearing on the motion for new trial, the prosecutor called the document a

---

[19] It should be noted both the victims and defendant in this case are white.

[20] Counsel's assertion, "The State refrained from disclosing to the defense any and all training manuals released after *Harris*, which would inform subsequent explanations for striking African American jurors," presumes such a manual even exists, but this assumption appears completely unfounded.

"sham of a study by the Louisiana Crisis Assistance Center" included here to "keep it in the forefront."

However, to argue previous capital convictions and death sentences originating from Jefferson Parish have been reversed on racial discrimination injury selection, *see state* v. *Harris,* 01-0408 (La. 6/21/02), 820 So.2d 471 and *Snyder* v. *Louisiana,* 552 U.S. 472, 128 S.Ct. 1203, 1207, 170 L.Ed.2d 175 (2008), does not lead to the logical conclusion the same happened in the present case. Here, the State gave its reasons on the record for excusing jurors, and the district court deemed those reasons race-neutral. Thus, even accepting appellate counsel's premise the Jefferson Parish District Attorney's Office has historically shown a racial bias in selecting juries, there must be some demonstrable proof such was the case in the present trial for defendant's argument to succeed. Yet, in all of the *Batson* challenges exercised in defendant's capital trial and reproduced in this appendix, *supra,* the State gave its reasons on the record for excusing the jurors, and in every challenge, the district court ruled those reasons race-neutral, suggesting a clear intent on the part of the current prosecutors to distance themselves from the errors of their office in the past. Notwithstanding any historical precedent in Jefferson Parish to the contrary, we find no racial discrimination tainted jury selection in the instant case.

Assignment of Error No. VII

In this assignment of error, defendant claims discrimination based upon religious affiliation in the selection of the petit jury violates the First, Sixth, and Fourteenth Amendments to the United States Constitution. However, he quickly concedes neither the United States Supreme Court nor this Court has extended *Batson* to challenges based on religious affiliation. Consequently, counsel is unable to support his claim jurisprudentially. Nevertheless, defendant focuses on three prospective jurors challenged peremptorily by the State to suggest the State impermissibly based its peremptory strikes on religious affiliation: Robert Ratcliff, GeJoan Johnson Garrett, and Jakeitha Patterson. Specifically, defendant avers the State challenged these three panelists on the basis of religious affiliation by relying on stereotypes rather than actual juror responses to *voir dire* questioning.

A juror whose views would either lead him to vote automatically against the death penalty or would substantially impair his or her ability to follow the instructions of the trial court and consider a sentence of death is not qualified to sit on the jury panel in a capital case. *Wainwright* v. *Witt,* 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985); *Witherspoon* v. *Illinois,* 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968); La. Code Crim. Proc. art. 798(2)(a) and (b). Exclusion of such jurors when their views stem from religious beliefs does not constitute discrimination in violation of La. Const. art. I, § 3. *State* v. *Sanders,* 93-0001, p. 20 (La. 11130/94),648 So.2d 1272, 1288 ("the 'single attitude' of opposition to the death penalty 'does not represent the kind of ... religious ... characteristic that underlies those groups that have been recognized as being distinctive'")(quoting *State* v. *Lowenfield,* 495 So.2d 1245, 1254 (La. 1985)), *cert. denied,* 517U.S. 1246, 116 S.Ct. 2504,135 L.Ed.2d 194 (1996); *see also State* v. *Robertson,* 97-0177, pp. 20-21 (La. 3/4/98), 712 So.2d 8, 25-26, *cert. denied,* 525 U.S. 882, 119 S.Ct. 190, 142 L.Ed.2d 155 (1998).

In the present case, each of the three venire members about whom defendant now complains was the subject of a *Batson* challenge, and their voir dire colloquies, as a whole, are summarized and/or reproduced in this appendix in Assignment of Error No. VI(A), *supra.*

Briefly, defendant suggests the State assumed Robert Ratcliff would favor rehabilitation to punishment based on his response he was a deacon in the Jesus is Lord Evangelical Ministries Church. Likewise, defendant complains the State had a "myopic view of religion" when it struck Gejoan Ganett because, on her jury questionnaire, she listed one of her hobbies as devotion, and yet, the subject remained completely unexplored during voir dire, suggesting a pretext for discrimination. Finally, defendant claims the State's proffered reasons for striking Jakeitha Patterson included her statement "even Jesus stood silent in front of his accusers," from which the State inferred she would be unable to impose the death sentence, despite her (occasional) statements to the contrary.

In the instant case, no juror was disqualified because of his or her religion. When viewing the entirety of these jurors' voir dire responses, it is clear the State excused Ratcliff, Ganett, and Patterson for their aversion to capital punishment. Religious discrimination played no part in jury selection here. *State* v. *Lucky,* 96-1687 (La. 4/13/99)(unpub'd appx.) 755 So.2d 845, *cert. denied,* 529 U.S. 1023, 120 S.Ct. 1429, 146 L.Ed.2d 319 (2000); *Sanders,* 93-0001 at p. 2, 648 So.2d at 1288. All were properly excused after it became clear their views on the death penalty would prevent or substantially impair their making of an impartial decision in accordance with their oath. La. Code Crim. Proc. art. 798(2)(b); *Robertson,* 97-0177 at pp. 20-21, 712 So.2d at 25-26. Consequently, we find this assignment lacks merit.

Assignment of Error No. VIII

In this assignment of error, defendant claims intersectional discrimination-discrimination at the intersection of both race and gender-in the selection of the petit jury violates the Sixth and Fourteenth Amendments to the United States Constitution. In what he posits "appears to be an issue of first impression in Louisiana," appellate counsel argues intersectional discrimination tainted defendant's trial because the State used five out of nine peremptory challenges to strike African American females.[21] While defendant urges intersectional discrimination gives rise to a cognizable claim under the Equal Protection Clause[22] and urges this Court to embrace this claim, he cites a paucity of jurisdictions, which have recognized the claim.[23]

---

[21] Note, not until after the State struck the fourth African American female "in a row" did the defense re-raised *Batson* and interposed a challenge under *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994), as well. Thus, apparently the intersectional discrimination notion was an after-thought for trial counsel.

A. Significant Evidence of Discrimination Against African American Women Permeated Voir Dire.

B. The State's Explanations for Striking African American Women Were Pretextual.

In these sub-parts, defendant recasts arguments previously advanced in Assignment of Error No. VI(A), *supra.* He points to prospective jurors Pamela Parker, Jakeitha Patterson, Selina Paul, Tammie Frazier, and GeJoan Johnson Garrett as black females, who were stricken under intersectional discrimination. As exhaustively addressed in Assignment of Error No. VI(A), *supra,* the State articulated race-neutral and gender-neutral explanations for its strikes. However, defendant now claims the district court failed in his step-three analysis to rule whether the State discriminated specifically against African American women. In defendant's rendition, "[t]he intersectional claim requires this separate ruling. The trial court should have also conducted comparative juror analysis of African-American women to white women and to African-American men." However, applying deductive reasoning, knowing both a *Batson* and a *J.E.B.* objection were before the district court when the court accepted as legitimate the State's reasons regarding the five named panelists complained of in these sub-parts, the district court undoubtedly retired the inquiry on both scores. No discriminatory intent of any kind was demonstrated on the State's part.[24] Accordingly, we find defendant fails to state a claim worthy of relief.

---

[22] Indeed, such strictures on jury selection discrimination are not new. *See Powers v. Ohio,* 499 U.S. 400, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991)(Equal Protection Clause precludes exclusion of prospective jurors on account of gender as well as race).

[23] *See People v. Motton,* 704 P.2d 176, 181 (Cal. 1985)(noting "black women face discrimination on two major counts-both race and gender-and their lives are uniquely marked by this combination."); *cf State v. Gonzales,* 808 P.2d 40 (N .M. App.)(holding strikes against Hispanic men present a cognizable issue under *Batson), cert. denied,* 806.2d 65 (N.M. 1991); *but see United States v. Nichols,* 937 F.2d 1257 (7th Cir. 1991), *cert. denied,* 502 U.S. 1080, 112 S.Ct. 989, 117 L.Ed.2d 151 (1992).

Assignment of Error No. IX

In this assignment of error, defendant claims the district court's wrongful denial of a defense peremptory strike requires a new trial. Specifically, he contends, by the district court's denial of the defense peremptory challenge against Jaelyn Burst, a complete jury was seated, which prevented the defense from exhausting its allotment of peremptory strikes.

---

[24] The five prospective jurors named in this sub-part each opposed capital punishment, with four of them having circled "D" on their jury questionnaire and the fifth having circled "E." Clearly, the State was justified in these peremptory strikes, regardless of the individuals' race and/or gender.

Jaelyn Burst became the twelfth juror seated. As background, when Ms. Burst was tendered to the defense, the jury was comprised of nine white females (Kristi Monie, Karen Rine, Erica Barletta Costello, Renee Kinchen, Gwendolyn Nettles, Gail Diket, Jessica Taylor, Versie Nicoll, and Judy Barhorst), one black male (Van Durio), and one white male (Edwin Vielmair). The defense had used eight peremptory challenges to remove five white males (Frederick Munch, Peter Rigby, Dimiter Bocskov, Frank Hendrickson, and Bert Robles), two white females (Katherine Werhan and Margaret Clawson),[25] and one black male (Derek Burns).

Jaelyn Burst was questioned in the fourth panel of *Witherspoon* voir dire. She informed the prosecutor she could consider both life and death and make her decision on what she heard in the courtroom.[26] She also assured him she would consider all mitigation, and if none was presented, she would search herself to find anything possible. Defense counsel posed no questions of Burst in prequalification, and she advanced to Panel 2 of general voir dire. She confirmed she respected defendant's Fifth Amendment privilege. She disclosed to defense counsel she had previously served as a witness in a civil case.[27] Thereafter Ms. Burst asked to clarify one point:

---

[25] Immediately preceding Jaelyn Burst, counsel exercised his eighth peremptory strike to excuse Margaret Clawson, a white female, at which time the State renewed its *reverse-Batson* challenge, and the district court ordered counsel to give race-neutral reasons. Counsel's only reason for striking Clawson was she had served on a previous jury, which found the defendant guilty on a theft charge. The district judge found the defense's reasons insufficient, stating: "That, as a whole is not a good enough race neutral reason that she's found somebody guilty..." Nevertheless, Ms. Clawson remained peremptorily excused by the defense without further discussion.

> I wanted to change one of my answers on the questionnaire. I wasn't thinking about it on Friday, but my husband's' step-father's father was robbed in his house and was strangled, and his house was burned. I didn't know him -- I did know him. I didn't know him while it happened in Birmingham, and I wasn't thinking about it on Friday –brought it to my mind. Well, I know since it was a question -- I don't think it will affect me as a juror, but I did want to bring that up.

After her disclosure, counsel posed no follow-up questions. The defense moved to strike Burst as its ninth peremptory challenge, prompting the State to remind the district court:

---

[26] Burst circled "C" on her jury questionnaire.

[27] Burst's jury questionnaire reveals she was a witness for the plaintiff.

> [The State]: They should state reasons, Judge, you've already found a pattern.
>
> [Defense Counsel]: I don't know that the Court did find a pattern.
>
> THE COURT: White males.
>
> [The State]: -- the initials white males. -- there was purposeful racial discrimination.
>
> THE COURT: She's a white female. Alright. Put it on to be safe.
>
> [Defense Counsel]: Judge, we have cut Ms. Burst. My colleagues have noted that she would tend to agree with Mr. Mary [prosecutor] while Mr. Mary was speaking. She is a -- she identified herself on the questionnaire as a Christian, Republican, which neither one in and of itself is a concern, but I tend to find that people that identify themselves as a generic Christian as opposed to a certain denomination tend to be more conservative. That kind of non-denominational -- it's a general feeling that we have, Judge. We feel that based on her demeanor during Mr. Mary's voir dire, tended to be pro State.

She tended to nod with Mr. Mary and be in agreement with Mr. Mary.

[The State]: Judge, may I remind the Court that it was during Mr. Fleming's [defense counsel] voir dire she chose to volunteer information that she believed that she had neglected, and so if the perception would be correct, why would she offer that up during the defense's voir dire? I don't recall spending an inordinate amount of time with Ms. Burst. She was succinct in her answers. She fully cooperated when Mr. Fleming was voir diring.

THE COURT: Is that her questionnaire? May I see it? I think the [sic] wasn't the question -- you know that, right?

[Defense Counsel]: Yes, sir.

THE COURT: The only thing that the defense has verbalized which can be independently witnessed, was that she said she was a Christian, Republican on the form, which she did not. That form says that her husband is a Christian, Republican.[28] I didn't find her to be –

---

[28] Indeed, question number 28 of the jury questionnaire asked the prospective jurors to indicate whether they are/were married, and if so for how long. By placing a check on the blank, the juror could also respond divorced, widowed, or

her demeanor to be pro State, so, I'm going to deny that challenge for Ms. Burst.

[Defense Counsel]: Judge, those are -- the reason I had given were race and gender neutral on that.

THE COURT: What did I say? Did I say race again?

[Defense Counsel]: I don't know what you said, I'm just perfecting the record. They are race and gender neutral reasons, Judge. You know, this is, of course, not a science, more of an art in picking a jury and a lot of what both sides are going by are just general observations and gut feeling and the gut feeling of my colleagues is to strike her.

---

single. Then the form asked: "If you are/were married, what is/was your spouse's: Name, Occupation, Education Level, Political party preference, Religious affiliation," with adjacent blanks for the jurors to respond to those inquiries. However, Judge Liljeberg was correct; no where on the form did it ask for the prospective juror's own political preference or religious affiliation, only that of his/her spouse.

Appellate counsel suggests it may be inferred Burst shares the same conservative views as her husband. However, the fact counsel did not bother to voir dire Burst on these matters suggests a discriminatory intent when he later challenged her claiming this was what concerned him about her.

[Defense Co-counsel]: And when he says colleagues, Judge, he's referring to me [co-counsel]. Mr. Mary has a way of endearing himself. He's a great looking guy, endearing himself to the female jurors --

[The State]: Judge, may I remind you that –

THE COURT: I'm going to let him do it.

[Defense Co-counsel] -- and I noticed it. I noticed her -- I think she was nodding with Mr. Mary and she sort of was in his comer. We believe that she is pro State and has endeared herself to Mr. Mary.

THE COURT: I have been trying to notice all of those things, all of those kind of subconscious things that the jurors -- in the event that this would occur. I did not find anything that I can verify and, I have been visual about it with respect to all of the questions of all of the jurors and their demeanor and how they acted. I didn't find it. I didn't see it with her at all. So, that leaves us with the only reason is the problem, which you stated was on the jury form questionnaire and that's not what she said. So, I'm denying that. Let's move on.

[Defense Co-counsel]: Note our objection for the record.

[Defense Counsel]: Please note our objection. I believe that's our Jury ....

***

[Defense Co-counsel]: And Judge, also for the record, relative to the Court's denial of our challenge of Ms. Burst, we would like to proffer for the record a copy of her questionnaire for the record. She notes that she is generally for the death penalty which was a part of our reasoning basically noting that she is pro State.

***

THE COURT: I'm not sure that y'all said what her position was regarding the death penalty, did you?

[Defense Co-counsel]: Yes, we said that she was pro State.

***

The Court: You said pro State, but you didn't mention what she said on the form. The forms admitted in the whole understanding, but I don't recall you making that –

> [Defense Co-counsel]: Judge, that is a part of what we use when we make our mental decisions as to where a person is. We listen to their answers out here in the audience and we go with their questionnaires.
>
> THE COURT: Y'all were talking about her demeanor, not what she put down on paper. What you said she put down on paper was Christian, Republican and that's what I ruled on.

After the judge denied the strike, finding the defense's reasons insufficient, Jaelyn Burst served as the twelfth juror.

A. There Was No Prima Facie Case of Discrimination.

In this sub-part, defendant claims the State never established a prima facie case of discrimination and whether the discrimination was based on race, gender, or a combination thereof. Counsel avers the district court never explicitly found the State established a prima facie case of discrimination.

However, the Supreme Court's decision in *Hernandez v. New York,* 500 U.S. 352, 359, III S.Ct. 1859, 1866, 114 L.Ed.2d 395 (1991), held the issue of whether a prima facie case has been established becomes moot if the district court requires and the responding party responds with his race-neutral reasons for excusing the prospective jurors. A trial judge may, therefore, effectively collapse the first two "stages of *Batson* and rule on the question of discriminatory intent without deciding or even deciding incorrectly the question of whether a prima facie case of purposeful discrimination has been established. *See also Johnson v. California,* 545 U.S. 162, 170-72, 125 S.Ct. 2410, 2417-18, 162 L.Ed.2d 129 (2005)(a moving party "satisfies the requirements of *Batson's* first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred"; establishing low threshold to ease the transition to *Batson's* second step for the party defending the peremptory challenge to produce "actual answers").

As noted, Burst was the twelfth juror selected. At a certain point throughout voir dire, each side gave their neutral reasons following a *Batson* or reverse-*Batson* challenge. Likewise, when the defense struck Burst, the district court called upon counsel to put his reasons on the record. Under *Hernandez* and *Johnson,* an initial finding of a prima facie case of discrimination against white and/or female jurors was not necessary and actually moot once counsel gave his reasons for striking Burst. Consequently, we find the claim in this subpart is baseless.

B. The Defense Explanation for Striking Juror Burst Was Race Neutral.

C. The Trial Court Erroneously Failed to Impose the Ultimate Burden to Prove Discrimination on the State.

Defense counsel's articulation regarding Burst was decidedly weak. First, he neglected to state the one disclosure Burst made, which could possibly have carried the day in the race/gender-neutral determination, namely, a family member had been the victim of a home invasion,[29] and thus, she may have empathized with the victims herein. Instead, counsel insinuated Burst was attracted to the handsome prosecutor, who was" endearing himself to the female jurors." Such an explanation, employing gender-specific language, comes close to pretextual. Finally, the jury questionnaire form provided no shelter because the form merely asked the political and religious affiliation of the juror's spouse. Thus, whether Ms. Burst herself was a "Christian, Republican" was never explored on voir dire. Under these circumstances, we find the district court properly denied the peremptory challenge.

Even assuming *arguendo* the district court erred in denying the defense's peremptory challenge of Jaelyn Burst, the Supreme Court recently held in a case on all fours with the present one, the error, if any, would not deprive defendant of a fair trial. In *Rivera v. Illinois,* _U.S. _, 129 S.Ct. 1446, 173 L.Ed.2d 320 (2009), during the jury selection in defendant's state court first-degree murder trial, the defense had exercised three peremptory challenges, two of which were against women, one of whom was

---

[29] Admittedly, the familial relationship was somewhat attenuated, a step-grandfather by marriage, and still further removed since she had yet to marry into the family when the offense occurred.

African American. Thereafter, the defense sought to excuse Deloris Gomez by peremptory challenge, conceding there was no basis to challenge her for cause as she met all the requirements for jury service and she bore no bias against the defendant. In chambers, the judge raised concerns *sua sponte* the defense was discriminating against Gomez under *Batson,* although he did not specify the type of discrimination he suspected (race, ethnicity, or sex) and ordered counsel to state his reasons for excusing Gomez.[30] The trial court rejected the defense peremptory challenge, and Gomez served as the foreperson on the jury that convicted Rivera of first-degree murder. The Illinois Supreme Court affirmed the conviction, holding the peremptory challenge should have been allowed, but rejecting Rivera's ultimate argument the improper seating of Gomez was a reversible error. Accordingly, the court held the denial of Rivera's peremptory challenge did not qualify as a structural error requiring automatic reversal.

The United States Supreme Court affirmed the judgment of the Supreme Court of Illinois, opining the trial judge's refusal to excuse Gomez did not deprive Rivera of his constitutional right to a fair trial before an impartial jury. *Id.,* _U.S. _, 129. S.Ct at 1454. Relying on *Ross* v. *Oklahoma,* 487 U.S. 81, 108 S.Ct. 2273, 101 L.Ed.2d 80 (1988), and *United States* v. *Martinez-Salazar,* 528 U.S. 304, 120 S.Ct. 774, 145 L.Ed.2d 792 (2000), the Court found, because no member of the jury as finally composed was removable for cause, no violation of Rivera's Sixth Amendment right to an impartial jury or his Fourteenth Amendment right to due process had been violated. Thus, "[i]f a defendant is tried before a qualified jury composed of individuals not challengable for cause, the loss of a peremptory challenge due to a state court's good-faith error is not a matter of federal constitutional concern." *Rivera*, _ U.S. _, 129 S.Ct. at 1453.[31]

---

[30] The judge interjected Gomez "appears to be African American." *Rivera,*_ U.S._ , 129 S.Ct. at 1451

The same reasoning applies with equal force in the instant case. Burst was not challengable for cause, and indeed, neither side sought to excuse her for cause. Nothing presented demonstrates the district court abused his broad discretion in rejecting the defense's reasons. At the time, the defense had four remaining peremptory challenges and could have utilized one or more in the form of backstrikes[32] to prevent completion of the jury panel had it chosen so. Consequently, appellate counsel's claim, by seating Burst, the district court prevented the defense from exhausting its peremptory strikes is baseless. We find this assignment of error "fails on the merits.

---

[31] The Louisiana Constitution guarantees a defendant the right to challenge jurors peremptorily. La. Const. art. I, § 17.

[32] Backstriking is a party's exercise of a peremptory challenge to strike a prospective juror after initially accepting him. La. Code Crim. Proc. art. 795(B)(1) states "[p]eremptory challenges shall be exercised prior to the swearing of the jury panel." Thus, as a matter of jurisprudence, a juror temporarily accepted and sworn in accordance with La. Code Crim. Proc. art. 788 may be challenged peremptorily before the swearing of the jury panel in accordance with La. Code Crim. Proc. art. 790. *State v. Watts*, 579 So.2d 931 (La. 1991).

Assignment of Error No. X

In this assignment of error, defendant asserts the district court's rulings skewed the jury in favor of the death penalty and deprived him of his rights to a fair and impartial jury and to a reliable determination of his sentence.

A trial court is vested with broad discretion in ruling on challenges for cause and its rulings will be reversed only when a review of the voir dire record as a whole reveals an abuse of discretion. *State* v. *Cross,* 93-1189, pp. 6-7 (La. 6/30/95), 658 So.2d 683, 686;[33] *State* v. *Robertson,* 92-2660 (La. 1114/94),630 So.2d 1278, 1280. Prejudice is presumed by a trial judge when a challenge for cause is denied erroneously by a trial court *and* the defendant ultimately exhausts his peremptory challenges. *State v. Robertson,* 92-2660 at pp. 3-4, 630 So.2d at 1280; *State v. Ross,* 623 So.2d 643,644 (La. 1993).[34]

---

[33] Overruling on other grounds recognized in *State* v. *Junior,* 03-2425 (La. 6/29105), 915 So.2d 291.

[34] The rule is different on the federal level. *See United States* v. *Martinez-Salazar,* 528 U.S.304, 120 S.Ct. 774, 145 L.Ed.2d 792 (2000)(exhaustion of peremptory challenges does not trigger automatic presumption of prejudice arising from district court's erroneous denial of a cause challenge). However, on the federal level, a defendant may choose whether to exercise a peremptory challenge to cure the trial court's error, or to seat the juror and

Even in capital cases, this Court has repeatedly held failure to exhaust all peremptory challenges by the defense bars review on appeal. *See State v. Campbell,* 06-0286, p. 71 (La. 5/21108), 983 So.2d 810, 856 ("[A]n erroneous ruling on a challenge for cause which does not deprive a defendant of one of his peremptory challenges does not provide grounds for reversing his conviction and sentence. A defendant thus must use one of his remaining peremptory challenges curatively to remove the juror or waive the complaint on appeal, even in a case in which he ultimately exhausts his peremptory challenges."), *cert. denied,* _U.S._ , 129 S.Ct. 607, 172 L.Ed.2d 471 (2008); *State v. Blank,* 04-0204, p. 25 (La. 4/11107), 955 So.2d 90, 113, *cert. denied,* 552 U.S. 994, 128 S.Ct. 494, 169 L.Ed.2d 346 (2007); *State v. Wessinger,* 98-1234, p. 15 (La. 5/28/99), 736 So.2d 162, 178[35] *cert. denied,* 528 U.S. 1050, 120 S.Ct. 589, 145 L.Ed.2d 489 (1999); *State v. Koon,* 96-1208, pp. 16-17 (La. 5/20/97), 704 So.2d 756, 767, *cert. denied,* 522 U.S. 1001, 118 S.Ct. 570, 139 L.Ed.2d410 (1997); *State v. Connolly,* 96-1680, p. 8 (La. 7/1/97), 700 So.2d 810,818; *State v. Mitchell,* 94-2078, pp. 3-4 (La. 5/21/96), 674 So.2d250, 254, *cert. denied,* 519 U.S. 1043, 117 S.Ct. 614, 136 L.Ed.2d 538 (1996); *State v. Bourque,* 622 So.2d 198, 229-30

---

then raise the error on appeal if convicted. *Martinez-Salazar,* 528 U.S. at 315, 120 S.Ct. at 781.

[35] Superceded by statute on other grounds as stated in *State v. Gomez,* 00-0566 (La. 1117/01), 778 So.2d 549.

(La. 1993);[36] *State v. Fallon*, 290 So.2d 273, 282 (La. 1974); *but see State v. Sylvester*, 400 So.2d 640,644-45 (La. 1981).

In the present case, defendant did *not* exhaust his peremptory challenges in selecting the panel of twelve petit jurors and exercised only eight of his twelve peremptory challenges. *See State v. Vanderpool*, 493 So.2d 574, 575 (La. 1986). Under *Vanderpool*, a defendant, who has not exhausted his peremptory challenges, must show prejudice from a ruling denying a challenge for cause, *e.g.*, he had to hoard his remaining peremptories at the cost of accepting a juror he would have excluded. *Id.* ; *see also State v. Robertson*, 97-0177 (La. 3/4/98), 712 So.2d 8, *cert. denied*, 525 U.S. 882, 119 S.Ct. 190, 142 L.Ed.2d 155 (1998); *Ross*, 623 So.2d at 644. The defendant makes no attempt to satisfy *Vanderpool's* prejudice requirements. Instead, he argues simply the district court erred in its rulings. A review of the record reveals trial counsel clearly was aware of the number of peremptories available to him toward the end of voir dire, yet he made no attempt to exhaust, although he was afforded the opportunity to employ backstrikes. Further, trial counsel did not specifically state for the record the district court's arguably erroneous rulings had forced him to hoard challenges and accept a questionable juror.

---

[36] Overruled on other grounds by *State v. Comeaux*, 93-2729 (La. 7/11197), 699 So.2d 16.

Nevertheless, defendant's failure to exhaust bars review by this Court. *See Mitchell,* 94-2078 at pp. 3-4, 674 So.2d at 254 (juror allegedly would not consider mitigating evidence and would be biased against defendant if he failed to testify; this Court "need not reach ... whether there was an erroneous denial of [a cause] challenge," because defendant struck the juror and had peremptories remaining at the close of jury selection); *Koon,* 96-1208 at pp. 16-17, 704 So.2d at 767 (juror held fast to belief in defendant's guilt; Court need not decide whether the challenge for cause was improperly denied, "[b]ecause the defense failed to use all its peremptory challenges .... ").

Assignment of Error No. XI

In this assignment, defendant attacks Louisiana's death qualification procedure as facially unconstitutional because it violates his right to an impartial jury, unfairly leads to a death-prone jury, and deprives him of a fair cross-section of the venire available to non-capital defendants.

However, there is no question of the constitutional validity of La. Code Crim. Proc. art. 798 because it was drafted to conform to the constitutional requirements set forth in *Witherspoon v. Illinois,* 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d. 776 (1968) (holding a prospective juror, who would vote automatically for a life sentence, is properly excluded); *see also Wainwright v. Witt,* 469 U.S. 412,424, 105 S.Ct. 844, 852,83 L.Ed.2d 841 (1985). In *Lockhart v. McCree,* 476 U.S. 162, 106 S.Ct. 1758, 90 L.Ed.2d 137 (1986), the Supreme Court held the

Constitution does not prohibit excluding potential jurors under *Witherspoon* and "death qualification" did not result in a more conviction-prone jury. Likewise, this Court has repeatedly rejected the claim the *Witherspoon* qualification process results in a death-prone jury. *State v. Robertson,* 97-0177, pp. 19-20 (La. 3/4/98), 712 So.2d 8, 25-26, *cert. denied,* 525 U.S. 882, 119 S.Ct. 190, 142 L.Ed.2d 155 (1998); *State v. Lindsey,* 543 So.2d 886, 896 (La. 1989), *cert. denied,* 494 U.S. 1074, 1105 S.Ct. 1796, 108 L.Ed.2d 798 (1990); *State v. Brown,* 514 So.2d99, 103-04 (La. 1987),*cert. denied,* 486U.S. 1017, 108 S.Ct. 1754, 100 L.Ed.2d 216 (1988); *State v. Bates,* 495 So.2d 1262, 1272 (La. 1986), *cert. denied,* 481 U.S. 1042, 107 S.Ct. 1986,95 L.Ed.2d 826 (1987); *State v. Ward,* 483 So.2d 578,582-83 (La. 1986), *cert. denied,* 479 U.S. 871, 107 S.Ct. 244, 93 L.Ed.2d 168 (1986); *State v. Jones,* 474 So.2d 919,927 (La. 1985), *cert. denied,* 476 U.S. 1178, 106 S.Ct. 2906, 90 L.Ed.2d 992 (1986); *State v. James,* 431 So.2d 399, 402 (La. 1983), *cert. denied,* 464 U.S. 908, 104 S.Ct. 263, 78 L.Ed.2d 247 (1983). We find the instant appeal adds nothing new to warrant revisiting this longstanding principle of law.

Assignment of Error No. XII

In this assignment of error, defendant contends the prosecutor and the district court misled jurors concerning their obligation to accept statutory mitigating circumstances. Defendant suggests statements by the district court and the prosecutor misrepresented the jurors' obligation to give meaningful effect to the mitigating circumstances. Defendant summarizes the complaint: "In effect, contrary to the plain language of the statute, the judge and the prosecutor instructed the prospective jurors that they were not required to accept the circumstances listed in Article 905.5 as mitigating," but rather, the jurors were required only to "consider" the factual propositions of La. Code Crim. Proc. art. 905.5, even if they did not find those propositions mitigated moral culpability.

La. Code Crim. Proc. art. 905.3 provides the "court shall instruct the jury concerning all of the statutory mitigating circumstances." As shown below, nothing said in voir dire diminished this responsibility.

A. The Prosecutor and the Judge Repeatedly Informed Jurors They Were Free to Reject the Mitigating Circumstances Prescribed by the Legislature.

Defendant cites various instances during voir dire in which the prosecutor and the district court told jurors, after considering the mitigating circumstances as required, they were free to reject them.[37]

---

[37] The judge plainly instructed the jurors on their duty to consider mitigation during voir dire:

> THE COURT: The law is that you have to consider those, and I will instruct you that you have to consider all those things as mitigating factors.... But the law is you have to consider these things, and I will instruct you that if you're selected, that it's going to be your duty to

As a general matter, "[t]he scope of voir dire examination lies within the sound discretion of the trial court, and its rulings will not be disturbed on appeal in the absence of a clear abuse of that discretion." *State v. Hamilton,* 92-1919, pp. 6-7 (La. 9/5/96), 681 So.2d 1217, 1222, *cert. denied,* 520 U.S. 1216, 117 S.Ct. 1705, 137 L.Ed.2d 830 (1997).

Notably, this semantic issue arose during the first round of jury selection when the State objected to the manner in which the defense questioned jurors concerning the weight they would accord a given mitigating circumstance. A bench conference ensued on how the parties should word their queries on mitigation, and the district court gave the following proposal to the attorneys, outside the presence of the jury, to which defense counsel voiced complete agreement and actually used in his own voir dire queries:

> consider. And when I say consider -- I say consider meaning ... the law is you've got to consider it. You have to think about it.
>
> ***
>
> You have to say, yeah, I will think about it. As long as I don't have to accept it -- as long as I'm free to reject it, if I want to, that's fine. But I will consider it. I
> will think about it. And I'm not just telling you I'm thinking about it --
>
> ***
>
> I'm not just paying lip service to it, I will really, truly think about it and consider it, as long as I can reject it. That's okay.

> THE COURT: Tell him he's free -- by law, the Judge will instruct him that he has to consider it. He can either accept it or reject it, but he has to consider it.
>
> [Defense Counsel]: That's fine.
>
> (End of discussion at the bench.)
>
> [Defense Counsel]: And just to be clear with you, Mr. Bums, I'm not asking whether or not you accept it or reject it, because the Judge will instruct you that you have to consider it. You have to seriously consider it. **Whether you accept it or reject it or not, that is your decision.** (Emphasis added).

Clearly, the defense saw no error in using the same "accept or reject" questions regarding mitigation in its voir dire. Absolutely no bar, statutory, jurisprudential, or otherwise, precludes the language used by the State and the district court herein, informing the jurors, after considering the mitigating circumstances as required, they could accept or reject them as they saw fit.

B. Both Louisiana's Statutory Scheme and the United States Constitution Require the Jury to Consider Factors Such as Youth, Intoxication, and Mental Illness as Mitigating, and Jurors Are Not Permitted to Reject This Characterization.

Contrary to defendant's assertions, the district court and the prosecutor, and even defense counsel, did not misstate the law by informing the jurors, after considering the mitigating circumstances as required, they were then free to accept or reject them. *See Sawyer v. Whitley,* 945 F.2d 812,822 (5th Cir. 1991)("Under the Louisiana scheme, therefore, a rational juror conceivably could choose to give no weight to any of the mitigating factors and impose the death penalty so long as it has found, beyond a reasonable doubt, the existence of a single aggravating circumstance." (emphasis supplied)), *aff'd by* 505 U.S. 333, 112 S.Ct. 2514, 120 L.Ed.2d 269 (1992).

Likewise, appellate counsel's reliance on *Eddings v. Oklahoma,* 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982) is misplaced.[38] *Eddings* supports the language used by Judge Liljeberg and the prosecutor herein the sentencer may not refuse to consider, as a matter of law, any relevant mitigating evidence. *Id.,* 455 U.S. at 114-15, 102 S.Ct. at 876-77. "The sentencer ... may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration." *Id.* Thus, the sentencer is free to reject any mitigating evidence after first considering it.

---

[38] In *Eddings,* the trial judge instructed the jury to disregard the mitigating evidence Eddings had proffered on his behalf, a situation which did not occur in the present case. *Eddings,* 455 U.S. at 114-15, 102 S.Ct. at 876-77. Conversely, here the district court required the prospective jurors consider all relevant mitigating evidence and then give that evidence whatever weight they chose to attribute it.

Neither Judge Liljeberg nor the prosecutor advised the prospective jurors they could forego considering mitigation evidence. *See Hitchcock v. Dugger,* 481 U.S. 393, 107 S.Ct. 1821,95 L.Ed.2d 347 (1987)(trial court cannot preclude consideration of non-statutory mitigating circumstances); *Lockett v. Ohio,* 438 U.S. 586, 605-06, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978)(holding the Eighth and Fourteenth Amendments require a sentencer not be precluded from considering any aspect of a defendant's character or record, proffered in mitigation, as a basis for determining sentence); *Atkins v. Singletary,* 965 F.2d 952, 962 (11 th Cir. 1992)("Acceptance of nonstatutory mitigating factors is not constitutionally required; the Constitution only requires that the sentencer *consider* the factors."), *cert. denied,* 515 U.S. 1165, 115 S.Ct. 2624, 132 L.Ed.2d 865 (1995). Similarly, this Court has instructed, II [w]hile a juror has the discretion to assign whatever weight the juror deems appropriate to any aggravating and mitigating Circumstance established by the evidence, the juror *must* be willing to consider mitigating evidence relevant to the character and propensities of the defendant.... There is a significant difference between a prospective juror's agreeing to consider mitigating evidence and the juror's determination of the importance of that evidence." *State v. Miller,* 99-0192, pp. 8-9 (La. 9/6/00), 776 So.2d 396,402-03 (footnote omitted), *cert. denied,* 531 U.S. 1194, 121 S.Ct. 1196, 149 L.Ed.2d 111(2001). Defendant appears to have blurred that distinction. We, therefore, find the claims in this assignment of error are baseless.

Assignment of Error No. XIII

In this assignment of error, defendant claims the district court improperly granted the State's challenge for cause to remove prospective juror, Wilfredo Woods,[39] who indicated he would trust police officers more than convicted felons.

As a general rule, La. Code Crim. Proc. art. 800(B) provides a defendant cannot complain of the trial court's granting a state challenge for cause unless the ruling affords the state more peremptory challenges than it is entitled to by law. *State v. Jones*, 408 So.2d 1285, 1291 (La. 1982). In the instant case, the State used only nine of its allotted peremptory challenges during jury selection, and thus, defendant's claim regarding the district court granting the State's challenge for cause does not warrant review on the merits.

PENALTY PHASE

Assignment of Error No. XV

In this assignment of error, defendant argues the appropriate standard for the jury's sentencing determination of death should be beyond a reasonable doubt.

---

[39] According to his jury questionnaire, Wilfredo Woods indicated his race is "White Hispanic."

A. The *Apprendi* Rule Applies to the Determination that Death Should be Imposed.

In sub-part A, defendant claims the standard of proof the jury should apply in their sentencing determination should comport with the rule of *Apprendi v. New Jersey,* 530 U.S. 466, 476, 120 S.Ct. 2348,2355, 147 L.Ed.2d 435 (2000)(other than the fact of a prior conviction, "any fact ... that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt."). In defendant's rendition, the jury must apply the *Apprendi* rule to unanimously determine beyond a reasonable doubt death is the appropriate punishment, citing *Ring v. Arizona,* 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002).

However, *Ring* requires jurors only find beyond a reasonable doubt all predicate facts, which render a defendant eligible for the death sentence, after consideration of the mitigating evidence. *Id.,* 536 U.S. at 609, 122 S.Ct. at 2443. While defendant now argues *Ring* should extend such a requirement to the ultimate sentence as well as the predicate facts, neither *Ring,* nor Louisiana jurisprudence for that matter, requires jurors to reach their ultimate sentencing determination beyond a reasonable doubt. *State v. Koon,* 96-1208, p. 27 (La. *5120/97),* 704 So.2d 756, 772-73 ("Louisiana is not a weighing state. It does not require capital juries to weigh or balance mitigating against aggravating circumstances, one against the other, according to any particular standard."), *cert. denied*, 522 U.S. 1001, 118 S.Ct. 570, 139 L.Ed.2d 410 (1997). This Court rejected the same argument in *State v. Anderson*, 06-2987, p. 61 (La. 9/9/08), 996 So.2d 973, 1015,[40] and we do so again here.

B. The Eighth and Fourteenth Amendments Demand Heightened Reliability in Capital Sentencing Proceedings, and Thereby Require the Jury Determine Death is the Appropriate Punishment Beyond a Reasonable Doubt.

In this sub-part, defendant complains Louisiana's sentencing scheme does not provide a standard of proof to measure the level of certainty the jury has in making the determination death should be imposed. Additionally, defendant argues Louisiana imposes no safeguard to ensure those who receive a death sentence are more culpable than those against whom the jury found an aggravating circumstance, but nonetheless recommended a life sentence.[41] In defendant's view, this standard-less procedure is incompatible with the heightened need for reliability in capital sentencing determinations. *See California v. Ramos,* 463 U.S. 992,998-99, 103 S.Ct.3446, 3452, 77 L.Ed.2d 1171 (1983)(recognizing "the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination.").

---

[40] Certiorari denied by *Anderson v. Louisiana*, _U.S. _, 129 S.Ct. 1906, 173 L.Ed.2d 1057 (2009).

[41] Clearly, counsel is making a veiled reference to co-defendant, Kellen Parker, who was tried separately and found guilty of first-degree murder. However, Parker's sentencing jury could not agree, and thus, a life sentence was imposed. Nevertheless, throughout both trials, defendant was always portrayed as the more culpable, and the fact he was sentenced to death and Parker was not may demonstrate the juries picked up on the nuances separating their respective culpability.

C. The Text of Article 905.3 Requires the Jury Determine Death to be the Appropriate Punishment Beyond a Reasonable Doubt.

Despite defendant's claims to the contrary, Louisiana's capital sentencing scheme is not rudderless or without standard of proof. According to La. Code Crim. Proc. art. 905.3: "A sentence of death shall not be imposed unless the jury finds beyond a reasonable doubt that at least one statutory aggravating circumstance exists and, after consideration of any mitigating circumstances, determines that the sentence of death should be imposed."

In the present case, the district judge scrupulously adhered to the Louisiana Benchbook's recommended jury charges and gave the jury the proper guidance:

> Before you may decide whether or not a sentence of death should be imposed, you unanimously must find beyond a reasonable doubt that at least one statutory aggravating circumstance existed.

> If you find beyond a reasonable doubt that an aggravating circumstance existed, you may consider imposing a sentence of death. The finding of an aggravating circumstance does not mean that you must impose a death penalty. If, however, you do not unanimously find beyond a reasonable doubt that a statutory aggravating circumstance existed, then life imprisonment without benefit of probation, parole or suspension of sentence is the only sentence that may be imposed.
>
> Even if you find the existence of an aggravating circumstance, you must also consider any mitigating circumstances before you decide that a sentence of death or life imprisonment without benefit of probation, parole or suspension of sentence should be imposed.

Nothing presented causes concern the jury may have labored under a misguided standard in sentencing defendant to death. This Court has implicitly upheld the statutory framework of the capital sentencing procedure, both in the specific cases when we considered the question, *see State v. Welcome,* 458 So.2d 1235, 1251-54 (La. 1984)(on reh'g), *cert. denied,* 470 U.S. 1088, 105 S.Ct. 1856,85 L.Ed.2d 152 (1985), and in all of the cases in which we have upheld death sentences imposed under the scheme. As the *Welcome* court noted, the statutory scheme presently used in Louisiana combines what appears to be the best of several statutory schemes previously approved by the United States Supreme Court. *Id.* Our scheme unquestionably passes constitutional muster. Accordingly, we find this assignment lacks merit.

Assignment of Error No. XIX

In this assignment of error, defendant contends the prosecutors' closing arguments improperly commented on his decision not to testify, thereby violating his Fifth Amendment right against self-incrimination. Appellate counsel accuses both prosecutors of improperly commenting on defendant's failure to show emotion during the State's presentation of victim-impact evidence and equating that with defendant having no remorse for his crimes. In counsel's rendition, the State's claim could not be rebutted without defendant's own testimony.[42] Finally, counsel suggests the error "warranted a mistrial" at the penalty phase.

However, trial counsel did not move for a mistrial or even object to the portions of the State's penalty phase closing arguments about which appellate counsel now complains and, thus, failed to preserve the claims for appellate review by raising a contemporaneous objection. La. Code Crim. Proc. art. 841; *State v. Wessinger*, 98-1234, p. 20 (La. 5/28/99), 736 SO.2d 162,181[43] (scope of review in capital cases is limited to alleged errors contemporaneously objected to), *cert. denied*, 528 U.S. 1050, 120 S.Ct. 589, 145 L.Ed.2d 489 (1999). Thus, we are procedurally barred from reviewing this claim.

---

[42] This assertion rings a bit hollow because the district court permitted defendant's mother to read from the stand a poem defendant had written to her, over the State's stringent objection the demonstration would afford defendant an opportunity to testify without taking the stand and subjecting himself to cross-examination.

MISCELLANEOUS

Assignment of Error No. XVI

In this assignment of error, defendant claims defects in the grand and petit jury pool violate the Fifth, Sixth, and Fourteenth Amendments and require reversal of his conviction and death sentence.

A. The Trial Court Erroneously Denied the Defense Motion to Quash Based Upon the Exclusion of Pardoned Felons from Jury Service.

In this sub-part, defendant claims an irreconcilable conflict exists between La. Const. art. I, § 20, which guarantees" [f]ull rights of citizenship shall be restored upon termination of state and federal supervision following conviction for any offense," and La. Code Crim. Proc. art. 40 1 (A)(5), which provides one qualification to sit as a juror is the juror "[n]ot be under indictment for a felony nor have been convicted of a felony for which he has not been pardoned." In counsel's view, where, as here, an act of the legislature conflicts with a constitutional provision, the latter trumps the former.

---

[43] Superceded by statute on other grounds as stated in *State v. Gomez*, 00-0566 (La. 1117/01), 778 So.2d 549.

On or about March 8, 2004, defense counsel filed a motion to quash the indictment based on improper exclusion of jurors from the grand jury process in violation of La. Const. art. I, § 20. On March 31, 2004, the district court denied the motion, noting the statute is not unconstitutional and "there's been no showing that any perspective [sic] grand juror has been excluded to Mr. Dressner's detriment or prejudice."

This Court has recognized the restoration of the full rights of citizenship under La. Const. art. I, § 20 restores only the basic rights of citizenship such as the right to vote, work, or hold public office, but does not restore privileges and "status of innocence" as an executive pardon under La. Const. art. IV, § 5(E)(1) does. *State v. Adams*, 355 So.2d 917, 922 (La. 1978).[44] Moreover, La. Const. art. V, § 33(A) provides: "A citizen of the state who has reached the age of majority is eligible to serve as a juror within the parish in which he is domiciled. **The legislature may provide additional qualifications.**" (Emphasis added). The constitutional provisions must be read *in pari materiae,* and the general constitutional principle of La. Const. art. I, § 20 is modified by the particular constitutional principle established in La. Const. art. V, § 33. The Legislature was well within its constitutional authority in instituting the additional qualifications in La. Code Crim. Proc. art. 401.

---

[44] However, an automatic pardon for a first felony offender under La. Const. art. IV, § 5(E)(1), while restoring some privileges, does not restore the status of innocence to a convict, who has merely served out his sentence. *Id.*; *Diaz* v. *Chasen*, 642 F.2d 764, 765 (5th Cir. 1981).

In the present case, while defendant does not identify any specific juror in support of this claim, there were at least two prospective jurors, who had prior convictions. First, Rodney Preatto[45] disclosed to the district court he was a convicted felon with a conviction for possession from the late 1980's or early 1990's. He further disclosed he received a "full pardon," but still sought to be excused from jury service because he "honestly couldn't give [] 100 percent of [his] total attention on this case," because he was going through a divorce. Defense counsel immediately offered, "Joint motion to excuse," while the prosecutor stood mute. Second, Shane Cotham noted on his jury questionnaire he had previously been convicted of theft. At the beginning of general voir dire, the judge noted he had received the first offender pardon for Cotham, so "he's qualified to serve as long as he has his pardon." In fact, Cotham did not serve on the jury. *Cf. State v. Jacobs,* 04-1219, p. 12 (La. App. 5 Cir. 5/31/05), 904 So.2d 82, 91 ("Restoration of full rights of citizenship upon release from federal or state supervision under Article I, § 20 does not restore a convict's right to sit on a jury."), *writ denied,* 05-2072 (La. 4/28/06), 927 So.2d 282, *cert. denied,* 549 U.S. 956, 127 S.Ct. 385, 166 L.Ed.2d 276 (2006).

---

[45] According to his jury questionnaire, Mr. Preatio is a black male. He acknowledged a previous conviction for possession of cocaine.

No conflict is apparent between La. Code Crim. Proc. art. 401(A)(5) and La. Const. art. I, § 20, and thus, we find the district court properly denied defendant's motion to quash the indictment on these grounds.

B. The Trial Court Erroneously Denied the Defense Motion to Quash the Indictment Based on *State v. Jacko.*

Before trial, defense counsel filed a pleading captioned, "Motion to Quash the Indictment Based on Improper Exclusion of Jurors from Grand Jury Process Based upon Repealed Exemptions." The State responded in writing to defendant's motions. Specifically, the defense motion to quash alleged defendant had been indicted by a grand jury drawn from a general venire at a time when Jefferson Parish persisted in the granting of exemptions from jury service for public officials, members of the armed forces, certain professionals, and persons over the age of seventy. These exemptions had their source in La.S.Ct.R. XXV(2)(b)-(e) until the Court amended the rule in 1994 and eliminated all of them.[46] Defendant's motion specifically referred to the evidentiary hearings conducted in another Jefferson Parish capital case following its remand from this Court's reversal, *see State v. Harris,* 01-0408 (La. 6121/02),820 So.2d471, and counsel stipulated upon request, she would file "into the record of this court a transcript and exhibits from the *Harris* proceedings."

Although the motion did not allege racial or gender discrimination had tainted the general or petit venires or the selection of the grand jurors, who returned the indictment against defendant,[47] it relied on this Court's present Rule XXV(1), which secures to all litigants entitled to a jury trial juries "selected at random from a fair cross-section" of the parish in which the case is tried and to all qualified citizens the right (as well as the duty) to serve without exclusion "on account of race, color, religion, sex, national origin or economic status." The motion also explicitly relied on two cases from this Court, *State v. Jacko,* 444 So.2d 1185 (La. 1984), and *State*

---

[46] However, the voters of Louisiana then reinstated the exemption for persons over the age of seventy by approving 1999 La. Acts 1406, which amended La. Const. art. V, § 33 (B) to its present form. Section 33(B) now provides "[p]ersons who are seventy years of age or older shall be exempt from jury service and may decline to serve as jurors, but may elect to serve as jurors if they meet the other qualifications for service as jurors. The supreme court shall provide by rule for other grounds for the exemption of jurors."

[47] Similarly, in his brief to this Court, defendant fails to disclose the make up of the grand jury, which handed down his first-degree murder indictment.

v. Procell, 332 So.2d 814 (La. 1976), in which the Court quashed indictments returned by grand juries at a time when this Court's rule still provided exemptions because the jury commissioners had automatically excluded the jurors without providing them the opportunity to claim their personal exemptions in their own right.

La. Code Crim. Proc. art. 532(9) provides a motion to quash may be based on the ground "[t]he general venire or the petit jury venire was improperly drawn, selected, or constituted." *See also* La. Code Crim. Proc. art. 419(A)("A general venire, grand jury venire, or petit jury venire shall not be set aside for any reason unless fraud has been practiced, some great wrong committed that would work irreparable injury to the defendant, or unless persons were systematically excluded from the venires solely upon the basis of race."). Irreparable injury may not be presumed; the burden of proof rests on defendant to establish purposeful discrimination in the selection of grand and petit jury venires. *State v. Lee,* 559 So.2d 1310, 1313 (La. 1990), *cert. denied,* 499 U.S. 954, 111 S.Ct. 1431, 113 L.Ed.2d 482 (1991); *State v. Loyd,* 489 So.2d 898, 903 (La. 1986); *State v. Liner,* 397 So.2d 506, 516 (La. 1981); *State v. Manning,* 380 So.2d 54,57 (La.J980); *State v. Sheppard,* 350 So.2d 615, 651 (La. 1977).

Under *Duren v. Missouri,* 439 U.S. 357, 364, 99 S.Ct. 664, 668, 58 L.Ed.2d 579 (1979), "[i]n order to establish a prima facie violation of the fair-cross-section requirement, the defendant must show (1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process."

As an initial matter, members of various professions previously excused from jury service have never been recognized as a "distinctive group," which would deprive a criminal defendant of due process as a result of their right not to serve on a jury. In any event, at a hearing on March 31, 2004, the parties argued the motion to quash. Defense counsel submitted the matter on her motion, acknowledging she was doing so without introducing the *Harris* transcript, as she had promised. Counsel "adopt[ed] the argument that was done in the Ed Harris case." On behalf of the State, the prosecutor, who had argued the same issue in *Harris,* argued the State's position in the present case, relying on an exhibit initially generated by the Louisiana Crisis Assistance Center, whose data was subsequently enhanced by the Jefferson Parish Clerk of Court's Office (JPCC). This same exhibit had also been introduced in the *Harris* hearing.[48]

---

[48] Then-Judge Guidry denied Harris's motion to quash on May 11, 2004 (some six weeks following the hearing in the present case). In his judgment, Judge Guidry denied the grand jury/repealed exemption claim because Harris had failed to make a prima facie case of discrimination. When Harris sought review of that decision, the Fifth Circuit affirmed in a brief order signed by only two judges. Harris then sought review in this Court. This Court did not reach the merits, but remanded

---

the case to the Fifth Circuit with instructions to reconsider the case "by a three-judge panel." *State* v. *Harris,* 04-1941 (La. 8/2/04),877 So.2d 998 (citing La. Const. art. V, § 8(A) and (B)). Following remand, the Fifth Circuit issued a much more detailed order again denying Harris relief. *State* v. *Harris,* 04-0662 (La. App. 5 Cir. 9/8/04). Harris once more sought review on several bases, including the grand jury repealed exemptions issue, in this Court, which denied his application unanimously. *State* v. *Harris,* 04-2453 (La. 12110/04), 888 So.2d 843.

The evidentiary hearings conducted in *Harris* contained a welter of information on how Jefferson Parish comprised the grand and petit jury venires in the 1990s until early 2003, before the parish. completely reformed the process later in 2003. In pertinent part, the hearings established, by 2002, when the indictments in *Harris* and the present case were returned, the parish had compiled a "large pool" from which eligible jurors were ultimately obtained consisting of over 837,000 names, toughly twice the size of the parish population. The pool grew larger each year as voter registration records and driver's license records were merged. With updating, the pool ballooned even further with duplications. For example, a person was listed atone address for driver's license purposes, but then moved and voter registration listed the same person again at the new address. Both names would be listed in the pool.

Jury questionnaires were then sent out to determine eligibility for service. The process effectively reduced the large pool from 837,000 names to approximately 200,000 names. Those deemed eligible were given a so-called "scramble code 6," *i.e.,* a string of numbers beginning with "6" to identify the jurors individually and to indicate to the computer running the program the jurors were in the smaller selection pool subject to the successive, random-number generator programs to cull out 500 jurors at a time for the final selection process. Those persons deemed ineligible were given a variety of other number codes (excusal codes).

Applying the data in the *Harris* exhibit, and as argued by the State, 33,295 people were listed, and of that number, 30,573 were exempted because they were over the age of seventy. The remaining 2,722 included public officers, armed forces, police and fire, and professionals. Of that number, only five people have been potentially improperly excluded, clearly an infinitesimal number of the pool. Even if it were shown the total number of 2,722 were improperly excluded, this number would still only account for 0.0032% of the active juror pool. The prosecutor concluded, based on these statistics, the miniscule number of exclusions could not support an allegation of constitutional harm or irreparable injury.

At the conclusion of the arguments, Judge Liljeberg denied the defense motion to quash with the following reasons:

In support of Harris's motion, the Louisiana Crisis Assistance Center took a CD version containing the "large pool" data, *i.e.*, the some 837,000 names, and ran it through a computer to sort out all of the Code-6 eligible jurors, leaving a smaller large pool of 677,774 names. The computer then sorted out the various pertinent excusal codes to accommodate the former exemptions granted by La.S.Ct. Rule XXV(1) as follows:

Public Officers	76
Armed Forces	572
Police and Fire	803
Professional	1,271
Over 70	30,573
Total	33,295

> I don't think that the defendant has shown that he has suffered any irreparable injury based on what appears to be oversights by the clerk of court. ... I think that the most compelling case cited by the defendant is [] State versus [Jacko] ... at 444 So.2d 1185 which is distinguishable because in the case here in Jefferson Parish it appears that it is an oversight and not a systematic exclusion. So I'm going to deny the motion.

In *Procell,* this Court emphasized the exemptions granted by former La.S.Ct.R. XXV were personal to the individual, who could waive the applicable exemption and thereby qualify himself for jury service. Thus, the rule did not operate to disqualify automatically any segment of the community from jury service. However, under the system employed in Sabine Parish and reviewed in *Procell,* "certain persons qualified to serve on juries [were] never given an opportunity to serve because the jury commissioners exclude[d] their names from the general venire on the basis that they fall under exemption set out by the rule, a rule which allows them, if they [chose], to serve notwithstanding the claimable exemption." *Procell,* 332 So.2d at 817. This Court reversed Procell's conviction and sentence based on a grand jury indictment returned under this system to enforce "the letter and spirit of the law" in the impartial selection of a general venire. *Id.*

Similarly, this Court reversed the defendant's conviction and sentence in *Jacko* because Evangeline Parish had also asserted the exemptions to automatically exclude individuals, who otherwise might have waived the exemption and entered the pool of qualified jurors. *Jacko,* 444 So.2d at 1186-87.

In the present case in contrast to the circumstances in *Procell* and *Jacko,* the defense presented no evidence any of the persons encompassed by the excusal codes based on the exemptions in former La.S.Ct.R. XXV were excluded automatically by the jury commissioners in Jefferson Parish as opposed to asserting their exemption (lawful at the time) personally on the jury questionnaires.

We note this issue has continued to rear its head in cases from Jefferson Parish, and each time the defendant has been unable to surmount the statutory hurdle of La. Code Crim. Proc. art. 419 to show some irreparable injury. *See Harris,* 01-0408 (La. 6/21102), 820 So.2d 471; *State v. Jacobs,* 04-1219 (La. App. 5 Cir. 5/31/05), 904 So.2d 82, *writ denied,* 05-2072 (La. *4/28/06),* 927 So.2d 282, *cert denied,* 549 U.S. 956, 127 S.Ct. 385, 166 L.Ed.2d 276 (2006). Defendant fails to make that showing here, and we find his claim in this sub-part warrants no relief.

C. Special and Local Laws Concealed the Problems in the Grand Jury Pool.

Before trial, defendant filed a motion to quash the indictment claiming La. Code Crim. Proc. art. 409.2 impermissibly exempts Jefferson Parish from La. Code Crim. Proc. art. 417(B)'s requirement for publication of venire lists, violating the prohibition against local or special laws found in La. Const. art. III, § 12. Defendant further avered these code articles permit Jefferson Parish to "conceal" their venire lists and the manner in which they are constructed. Finally, these practices resulted in diminishment of African American participation in the jury process, which could be addressed if this material was public. The State responded to the motion in writing.

La. Code Crim. Proc. art. 409.2 provides in pertinent part:

> B. The jury selection shall be administered by the jury commission for the parish of Jefferson as provided by law, except that the provisions of Article 417(B) shall not apply to Jefferson Parish.

Generally, a law is considered to be local if it operates within certain boundaries or in a particular area without the possibility of extending coverage when and if other localities meet the requisite criteria.[49] *State v. Brazley,* 00-0923, p. 4

---

[49] If the scope of a law is limited to certain parishes, it is immediately suspect as a local law. *Kimball v. Allstate Ins. Co.,* 97-2885, pp. 4-5 (La. 4/14/98), 712 So.2d 46, 51-52, citing *Polk v. Edwards,* 626 So.2d 1128, 1134 (La. 1993); *City of New*

Orleans v. Treen, 431 So.2d 390,394 (La. 1983); *State v. Slay,* 370 So.2d 508,511 (La. 1979); *State v. Labauve,* 359 So.2d 181, 182-83 (La. 1978). Yet, a law may be general, even if enforcement is limited to certain areas, if its coverage can be extended or if its operation is limited by reasonable classifications, such as population, size, or physical characteristics, not present elsewhere, and so long as it does not operate solely through a specific designation by parish. *Kimball,* 97-2885 at 4-5, 712 So.2d at 50-51, citing *Labauve,* 359 So.2d at 182-83 (the reasonableness of a law barring gill net fishing in Lafourche and Terrebonne Parishes not reached, as the narrow classification by its very terms did not permit future entrants to class and, therefore, represented a prohibited local law); *Slay,* 370 So.2d at 511 (division of state into two areas according to fishnet mesh size had no rational basis and relied solely on geographical location); *State v. Clement,* 188 La. 923, 178 So. 493 (1938)(ban on trapping on marsh land within a certain distance of the Gulf a prohibited local and special law, lacking a reasonable basis).

A law is not local, even if its application is limited to one area, if it has state-wide effect or if it regulates a topic of general interest and concern to the entire population of the state. *Kimball,* 97-2885 at 5-6, 712 So.2d at 51, citing *Polk,* 626 So.2d at 1134 (upholding as "general" legislation allowing a single land-based casino to be built in only one place because the law pertained to matters of state-wide interest and import); *Davenport v. Hardy,* 349 So.2d 858,860-63 (La. 1977)(upholding a law changing the election dates for two Orleans city court constables thereby extending their terms but also aligning their elections with district attorneys around the state); *State v. Dalon,* 35 La. Ann. 1141 (1883)(upholding the creation of the Orleans Criminal District Court).

A prohibited special law generally operates upon and affects only some members of a class or some property encompassed within a classification. It is intended to secure some private advantage or benefit. It confers particular privileges or imposes some peculiar disabilities or burdensome conditions on the

(La.11/28/00), 773 So.2d 718, 721 ("Our Constitution provides that the Legislature may not pass a local or special law regarding any of the subjects enumerated in LA. CONST. art. III, § 12(A).").

However, to prevail on a motion to quash, defendant must meet the requirements of La. Code Crim. Proc. art. 419(A), which provides "[a] general venire, grand jury venire, or petit jury venire shall not be set aside for any reason unless fraud has been practiced, some great wrong committed that would work irreparable injury to the defendant, or unless persons were systematically excluded from the venires solely upon the basis of race." Irreparable injury may not be presumed; the burden of proof rests on defendant to establish purposeful discrimination in the selection of grand and petit jury venires. *State v. Lee,* 559 So.2d 1310, 1313 (La.

---

exercise of some rights on only some members of a class arbitrarily selected from those similarly situated. A law is not special or local, if it is based on a substantial difference between the class created and the one excluded, and there is a reasonable basis for the classification created or different treatment between those included and those excluded. *Kimball,* 97-2885 at 6-7,712 So.2d at 52; *Livingston Downs Racing Ass'n, Inc. v. State,* 96-2890 (La. 12/2/97), 705 So.2d 149 (finding no local or special law and upholding denial of a license for off-track gaming as applicant did not satisfy all qualifications); *Labauve,* 359 So.2d at 182; *Clement,*188 La. 923 (areas included and excluded in trapping law unreasonable, thus special). *See* Huntington Odom, *General and Special Laws in Louisiana,* 16 La. L.Rev. 768, 770-71 (1956).

1990), *cert. denied,* 499 U.S. 954,111 S.Ct. 1431, 113 L.Ed.2d482 (1991).

In the present case, the district court held a hearing on March 31, 2004, at which time the State explained how the wording of art. 417(B) came to exclude Jefferson Parish:

> In 1995 Jon Gegenheimer [Clerk of Court for Jefferson Parish] was approached by several people who had been called for jury duty who expressed concern because their names were published in the official journal of Jefferson Parish every Thursday and they were afraid that in publishing their names it would serve to show would-be burglars that they would not be home that day, that their homes would be vacant. So Jon Gegenheimer successfully lobbied the legislature in 1995 to allow Jefferson Parish to be exempted for that reason only. So 417(b) was enacted to protect the citizenry of Jefferson Parish and, also, it only allows Jefferson Parish to not publish the venire lists. Those lists are available downstairs [in the Clerk's Office] to anyone who wishes to view them.

At the conclusion of the hearing, Judge Liljeberg ruled:

> I'm going to deny the motions for the following reasons. I believe that Article 409.2 and 417(b) don't regulate criminal actions. In addition, the defendant has not alleged or proved fraud or systematic exclusion which would warrant striking of the grand jury and therefore quashing the indictment.

Defendant has failed to demonstrate "some great wrong committed that would work irreparable injury" as required under La. Code Crim. Proc. art. 419. Accordingly, the district court properly denied defendant's motion to quash his indictment based on special and local laws. We find no relief is due, and these arguments fail on the merits.

Assignment of Error No. XVII

In this assignment of error, defendant contends the short form indictment listed neither the necessary factors charging him with first-degree murder, nor did it list any statutory aggravating circumstances, *i.e.,* the necessary elements to expose him to the death penalty. Thus, the indictment was constitutionally deficient because the aggravating circumstances were not charged therein, which in defendant's view violated the decision of *Ring v. Arizona,* 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002).

Presumably, defendant refers to the observation in *Ring* "'[u]nder the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.'" *Ring*, 536 U.S. at 600, 122 S.Ct. at 2439 (quoting *Jones v. United States*, 526 U.S. 227, 243, n. 6, 119 S.Ct. 1215, 1224, n. 6, 143 L.Ed.2d 311 (1999)); *see also Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348, 2362-63, 147 L.Ed.2d 435 (2000).

In the present case, on or about March 8, 2004, the defense filed two separate motions to quash the indictment, which both relied upon *Ring*.[50]

---

[50] The first motion bore the caption "Motion to Quash the Indictment as Constitutionally Insufficient under *Ring* v. *Arizona* and *United States* v. *Fell* [, 217 F.Supp.2d 469 (D.Vt. 2002)]," and the second motion was styled, "Motion for Discovery of Transcript of Legal Instructions to Grand Jury and to Quash Indictment for Failure to Indict Upon or Be Correctly Instructed Upon the Aggravating Circumstances."

Co-defendant, Kellen Parker, had previously filed a similar motion, and the district court held a hearing on his motion on May 1, 2003. In denying the motion, the district court observed:

> On the Motion to Quash the indictment it's clear that the Supreme Court has stated that the indictment or the Bill of Indictment does not have to list aggravating circumstances. Our criminal code expressly allows for short form indictments, so I'm going to deny this motion.

On December 12, 2003, counsel for defendant, Dustin Dressner, orally moved to adopt all motions filed by co-defendant's

At a hearing on March 31, 2004, the district court denied both motions.

The Louisiana Constitution of 1974 provides an accused shall be informed of the nature and cause of the accusation against him. La. Const. art. I, § 13. That requirement is implemented by La. Code Crim. Proc. art. 464, which provides:

> The indictment shall be a plain, concise, and definite written statement of the essential facts constituting the offense charged. It shall state for each count the official or customary citation of the statute which the defendant is alleged to have violated. Error in the citation or its omission shall not be ground for dismissal of the indictment or for reversal of a conviction if the error or omission did not mislead the defendant to his prejudice.

However, La. Code Crim. Proc. art. 465 authorizes the use of specific short form indictments in charging certain offenses, including first -degree murder. *See* La. Code Crim. Proc. art465(A)(31). The constitutionality of the short form indictments has been consistently upheld by this Court. *State v. Baylis,* 388 So.2d 713, 718-19 (La. 1980); *State v. Liner,* 373 So.2d 121, 122 (La. 1979), and authorities cited therein; *but see Liner,* 373 So.2d at 123,

---

counsel, which counsel subsequently memorialized with a written motion.

(Calogero, J., dissenting); *see also Schad v. Arizona,* 501.D.S. 624,631-37, 111 S.Ct. 2491,2496-2500, 115 L.Ed.2d 555 (1991) (indictments are not required to specify which overt act was the means by which a crime was committed). When those forms are used, it is intended a defendant may procure details as to the statutory method by which he committed the offense through a bill of particulars. *Baylis,* 388 So.2d at 719; *State v. Johnson,* 365 So.2d 1267, 1270-71 (La. 1978); La. Code Crim. Proc. art. 465, Official Revision Comment (a). More recently, in *State v. Washington,* 03-2890, p. 1 (La. 1130/04),865 So.2d 60, this Court reaffirmed this line of jurisprudence (and *Liner* in particular), notwithstanding *Ring's* apparent endorsement of long form indictments.

In the instant case, defendant was aware of the nature of the charges against him. The State properly charged defendant under the short form indictment, which read, in pertinent part:

> DUSTIN DRESSNER ... late of the PARISH OF JEFFERSON, on or about the 6th day of June in the year of our Lord, Two Thousand and Two with force and arms, in the Parish aforesaid, and within the jurisdiction of the Twenty-Fourth Judicial District Court of Louisiana, in and for the Parish aforesaid, violated R.S. 14:30 in that [he] did commit first degree murder of Paul Fasullo, contrary to the form and Statute of the State of Louisiana, and against the peace and dignity of the State.

Accordingly, defendant was charged in compliance with La. Code Crim. Proc. art.465 (A)(31), which provides as a short form indictment for first -degree murder: "A.B. committed first degree murder of C.D." *See State v. Neslo,* 433 So.2d 73,81-82 (La.1983).

Subsequently, the State filed its notice of intent to rely upon three aggravating circumstances under La. Code Crim. Proc. art. 905.4(A), specifically: (1) during the perpetration or attempted perpetration of an armed robbery or aggravated burglary; (4) the offender knowingly created a risk of death or great bodily harm to more than one person; and (7) the offense was committed in an especially heinous, atrocious, or cruel manner. Moreover, a bill of particulars was filed by defendant and answered "by the State, pre-trial discovery was performed, and several pre-trial hearings were conducted in which the State repeatedly informed the district court the defense had been given "open file discovery."

The longstanding Louisiana practice of requiring an indictment, which must be supplemented by the State if the defendant so requests, does appear to more than adequately satisfy the passing mention of "indictments" in the above excerpts from *Ring* and *Jones. See Washington,* 03-2890 atp. 1,865 So.2d at 60 (reinstating short form indictment for first-degree murder set aside by court of appeal under *Ring); Cf State v. Gainey,* 376 So.2d 1240, 1242 (La. 1979)("It is now clear that the constitutional provision that a defendant be informed of the nature and cause of the accusation is not to be restricted to mean that he must be informed By indictment.... [A] ,short form indictment is not subject to attack on the grounds that it does not adequately inform the defendant of the crime charged, because the state is required, on request for a bill of particulars, to inform the defendant of the essential facts of the offense charged." (citations omitted)). Finally, defendant does not suggest he was not properly informed of the charges against him, nor does he present any specific allegations of prejudice arising from the claimed defective indictment. We find, therefore, this assignment lacks merit.

Assignment of Error No. XX

In this assignment of error, defendant avers the district court's commutation instruction minimized the jury's responsibility and diminished reliability of the jury's death determination. Defendant claims the instruction invited the jury to decide his sentence on the basis of "arbitrary factors" in violation of his rights under the Eighth and Fourteenth Amendments.

In the present case, the district court gave proposed jury instructions to both the State and the defense, and the parties discussed the wording before agreeing on the final charges. The district court's commutation instruction comports with the language of La. Code Crim. Proc. art. 905.2(B).[51]

---

[51] Before trial, defendant filed a motion to declare unconstitutional La. Code Crim. Proc. art. 905.2(B). The parties

Moreover, in *State v. Loyd,* 96-1805, p. 18 (La. 2113/97), 689 So.2d 1321, 1331, this Court held "Louisiana's instruction is an even-handed one which accurately informs jurors that a death sentence as well as a life sentence remains subject to executive revision." This Court has previously rejected this same argument, *see State v. Wessinger,* 98-1234, pp. 34-35 (La. 5/28/99), 736 So.2d 162, 190,[52] and we do so again in this case.

Assignment of Error No. XXI

The second guilt phase instruction, which defendant criticizes, pertained to criminal intent wherein the district court stated: "Intent is a question of fact which may be inferred from the circumstances. You may infer that the defendant intended the natural and probable consequences of his acts."[53] Defendant maintains the instruction is

---

argued the motion at a hearing held on December 29, 2003, after which the district court denied the motion, relying on *State* v. *Loyd,* 96-1805 (La. 2113/97), 689 So.2d 1321.

[52] Certiorari denied by *Wessinger v. Louisiana,* 528 U.S. 150, 120 S.Ct. 589,145 L.Ed.2d 489 (1999). Superceded by statute on other grounds as stated *in State* v. *Gomez,* 00-0566 (La. *1/17/01),* 778 So.2d 549.

[53] Defendant further complains the intent presumption read in juxtaposition with the district court's next instruction on intoxication, which informed the jury in part "[t]he fact that a defendant was in an intoxicated condition at the time of the commission of a crime is usually not a defense, "essentially directed the trier of fact to reject his only defense. As defendant had admitted to stabbing Paul Fasullo, the only question remaining was whether he had done so with the intent to kill.

prohibited by *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979).

This Court considered and rejected this precise argument in *State v. Mitchell*, 94-2078 (La. 5/21/96), 674 So.2d 250, *cert. denied*, 519 U.S. 1043, 117 S.Ct. 614, 136 L.Ed.2d 538 (1996). This Court explained *Sandstrom* held the trial judge erred in instructing the jury "the law presumes that a person intends the ordinary consequences of his voluntary acts," because this instruction could be construed as a mandatory presumption by the jury and, thus, improperly shift the burden of proof from the state. *Mitchell*, 94-2078 at p. 5, 674 So.2d at 255. By contrast, an instruction, which informs the jury it may *infer* the defendant intended the natural consequences of his acts, creates no such presumption. *Id.* The instruction given in this case, like the instruction approved in *Mitchell*, does not set forth a conclusive or rebuttable presumption shifting the burden of proof from the State to the defendant. *See Francis* v, *Franklin*, 471 U.S. 307, 314-18,105 S.Ct. 1965, 1970-73,85 L.Ed.2d 344 (1985)(instruction allowing jury permissive inference of intent from circumstances violates due process only if unreasonable in light of facts); *State v. Mattheson*, 407 So.2d 1150, 1161-62 (La.

However, defendant's contention the jury did not consider his intoxication defense is somewhat undercut by the questions posed by the jurors during deliberation. Before returning their guilt phase verdict, the jurors returned to the courtroom, requesting further instruction on the definitions of first-degree murder, second-degree murder, and intoxication.

1981)(approving instruction setting out "a permissive inference that intent ... may be implied under certain circumstances"), *cert. denied,* 463 U.S. 1229, 103 S.Ct. 3571, 77 L.Ed.2d 1412 (1983). Accordingly, we find this argument also lacks merit.

Assignment of Error No. XXII

In this assignment of error, defendant cites *Sullivan v. Louisiana,* 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993) and *Cage v. Louisiana,* 498 U.S. 39, III S.Ct. 328, 112 L.Ed 339 (1990) in support of his claim the district court's reasonable doubt instruction contained an "impermissible articulation requirement," which shifted the burden of proof to the defense. The district court gave the following instruction:

> While the State must prove guilt beyond a reasonable doubt, it does not have to prove guilt beyond all possible doubt. Reasonable doubt is doubt based on reason and common sense, and is present when, after you have carefully considered all the evidence, you cannot say that you are firmly convinced of the truth of the charge.
>
> In considering the evidence, you must give the defendant the benefit of every reasonable doubt arising out of the evidence or lack of evidence. If you have any reasonable doubt as to ... a particular offense charged, you must

find the defendant not guilty of that offense.

In *Cage,* the United States Supreme Court held unconstitutional an instruction, which "equated a reasonable doubt with a 'grave uncertainty' and an 'actual substantial doubt.'" *Cage,* 498 U.S. at 41, 111 S.Ct. at 329. Conversely, the instruction in this case tracks almost verbatim the proposed charge on reasonable doubt in the Louisiana Judge's Criminal Bench Book, Vol. I, § 3.03 (1993), and did not include any terms, which would mislead the jury. Unlike the instruction in *Cage,* Judge Liljeberg's charge does not appear to overstate the degree of reasonable doubt required by the Due Process Clause. In addition, according to the United States Supreme Court's re-examination of its reasonable doubt jurisprudence undertaken in *Victor v. Nebraska,* 511 U.S. 1, 114 S.Ct. 1239, 127 L.Ed.2d 583 (1994), and this Court's implementation of *Victor* in *State v. Smith,* 91-0749 (La. 5/23/94), 637 So.2d 398,[54] the instruction in the instant case did not allow the jury to convict without satisfying the reasonable doubt requirement and did not require the jurors to articulate a good reason for reasonable doubt. Thus, we find the instruction passes constitutional muster and defendant's argument lacks merit.

Assignment of Error No. XXIII

---

[54] Certiorari denied by *Smith* v. *Louisiana,* 513 U.S. 1045, 115 S.Ct. 641, 130 L.Ed.2d 546 (1994).

In this assignment of error, defendant complains the penalty phase verdict form and concomitant jury instruction placed the burden of proving mitigation and the propriety of a life sentence upon the defense. In defendant's view, the verdict form limited the jury's consideration of mitigation to that "offered" by the defendant, and the district court's instruction left the jurors with the impression they must find mitigating circumstances unanimously before considering them, citing *Mills v. Maryland,* 486 U.S. 367, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988).

A review of the penalty phase verdict forms used in the instant case with respect to the sentencing determination reveals they both track verbatim the language of La. Code Crim. Proc. art. 905.7.[55] Notwithstanding defendant's claims to the contrary, nothing suggests the jury was misled by the statutory language used in the verdict form, and accordingly, defendant fails to show it introduced an arbitrary factor into the jury's deliberations. Moreover, at the penalty phase, the defense presented nine mitigation witnesses and, as such, did" offer" mitigating evidence. Furthermore, the district court instructed the jurors "[y]ou are not limited to those mitigating circumstances which are defined. You must also consider any other relevant mitigating circumstances which you feel should mitigate the severity of the penalty to be imposed." Defendant fails to demonstrate the language used in the penalty phase verdict form shifted the burden to the defense. See *State v. Manning, 03-1982,* p. 72 (La. 10/19/04), 885 So.2d 1044, 1106,[56] in which this Court rejected the same argument.

---

[55] In defendant's rendition, rather than accepting the statutory language under La. Code Crim. Proc. art. 905.7 for the life verdict, defendant would have preferred the district court instruct the jury "a single vote for life would result in a sentence of life imprisonment," although no such charge was proposed by the defense. While the district court did not instruct the jury in terms of the ramifications of a "single vote," he did inform the jury "should you be unable to agree unanimously on the determination, the law provides that the Court shall impose a sentence of life imprisonment at hard labor without benefit of probation, parole or suspension of sentence." In addition, defense counsel repeatedly argued the power of "only one of you" in his penalty phase closing argument.

Furthermore, the jury instruction in the instant case is unlike the instruction in *Mills.*[57] A fair reading of the district court's instructions at the close of the penalty phase reveals the judge instructed the jurors any finding concerning the aggravating circumstance advanced by the State must be unanimous and beyond a reasonable doubt. The instruction on mitigation did not include such a burden. The broad language used by the district court, particularly as contrasted with the rigid standards pronounced with reference to aggravating circumstances, adequately guided the jury on the way in which mitigation evidence was to be considered. Additionally, defendant makes no showing the jurors mistakenly applied the wrong burden in their deliberations regarding mitigation. We find, therefore, none of these claims merit relief.

---

[56] Certiorari denied by *Manning v Louisiana,* 544 U.S. 967, 125 S.Ct. 1745, 161 L.Ed.2d612 (2005).

[57] In *Mills,* the United States Supreme Court analyzed Maryland's three-part sentencing scheme. In part one, the jury found whether any aggravating circumstances existed. In part two, the jury found whether any mitigating circumstances existed. In the final part, the jury weighed the aggravating against the mitigating circumstances. *Mills,* 486 U.S. at 383-87, 108 S.Ct. at 1870-74. The error in the charge occurred because the trial judge repeatedly instructed jurors decisions had to be unanimous without stating the unanimity requirement was inapplicable to the second part's consideration of mitigating circumstances.

Assignment of Error No. XXIV

In this assignment of error, defendant avers the denial of a public execution violates the Eighth Amendment, challenging specifically the" secrecy" attendant to modem executions under La. Rev. Stat. §15:569(B)("Every execution shall be made in a room entirely cut off from view of all except those permitted by law to be in said room.").[58]

---

[58] Counsel for co-defendant, Kellen Parker, filed a pretrial motion styled, "Motion for Jury View of the Execution Process," which the district court denied as "irrelevant." In-depth evidence regarding the nature of the death penalty does not speak to the circumstances of the offense or the character of the defendant. *See* La. Code Crim. Proc. art. 905.2. Accordingly, it "makes no useful contribution to the process and serves to distract the jury's attention from the task at hand." *People v. Morris,* 807 P.2d 949,988 (Cal. 1991)(trial court did not err by refusing defense request to explain to jury the method of execution), *cert. denied,* 502 U.S. 959, 112 S.Ct. 421, 116 L.Ed.2d441 (1991). *See also People v. Pride,* 833 P.2d 643, 683

In the nineteenth century, executions in the United States became private events and moved from the public square to inside prison walls. *Furman v. Georgia,* 408 U.S. 238, 297, 92 S.Ct. 2726, 2756, 33 L.Ed.2d 346 (1972)(Brennan, J., concurring) ("No longer does our society countenance the spectacle of public executions, once thought desirable as a deterrent to criminal behavior by others. Today we reject public executions as debasing and brutalizing to us all.").

Under these circumstances, defendant fails to state a claim worthy of relief. Even assuming defendant's contentions had merit, the remedy would be a public execution, not reversal of his capital conviction and death sentence. Thus, we find no relief is due.

Assignment of Error No. XXV

In this assignment of error, defendant complains the Louisiana death penalty statute fails to ensure adequate proportionality review. Defendant further points out, rather than rest on the proportionality review conducted by this Court, an inquiry supported for the most part by the filing from the District Attorney's office, which prosecuted

---

(Cal. 1992)("Our cases make clear that information about administration of the death penalty does not aid the jury in making an individualized determination of the appropriate penalty in a particular case."), *cert. denied,* 507 U.S. 935, 113 S.Ct. 1332, 122 L.Ed.2d 709 (1993).

this particular case, he has supplemented the State's filing with his own Sentence. Review Memorandum, which he argues presents a more complete picture of the state of capital sentence review in terms of proportionality in the state of Louisiana.

We note, however, defendant's claim Louisiana's death penalty statute fails to ensure adequate proportionality review is apparently a non-starter with the United States Supreme Court. A recent Louisiana capital defendant, Brandy Holmes, filed an application for certiorari in the United States Supreme Court from her conviction and sentence of death, affirmed in *State v. Holmes*, 06-2988 (La. 1212108), 5 So.3d 42,on a single issue: this Court conducts comparative proportionality as part of its Rule XXVIII review in an inadequate manner because it does not systematically compare cases in which the death penalty has been returned to cases in which the death penalty has not been returned. Given the decision in *Pulley v. Harris*, 465 U.S. 37, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984), which held the Eighth Amendment does not require comparative proportionality review, it appeared *Holmes* was raising purely a question of state law, and the Supreme Court evidently agreed, as it denied her application. *Holmes v. Louisiana*, _U.S. _, 130 S.Ct. 70, 175 L.Ed.2d 233 (2009).

Therefore, we find this assignment of error is without merit.

Assignment of Error No. XXVI

In his final assignment of error, defendant argues the aggregation of error cannot be considered harmless and requires reversal of his conviction and sentence. Appellate counsel invites this Court to "conduct an independent review of the entire record" to ascertain if defendant received a fair trial and the jury reached a reliable sentencing determination.

However, review of all of defendant's assignments failed to uncover reversible error. This Court has pointed out, "the combined effect of the incidences complained of, none of which amounts to reversible error, [does] not deprive the defendant of his right to a fair trial." *State v. Copeland,* 530 So.2d 526, 544-45 (La. 1988)(quoting *State v. Graham,* 422 So.2d 123, 137 (La. 1982)), *cert. denied,* 489 U.S. 1091, 109 S.Ct. 1558, 103 L.Ed.2d 860 (1989). There is no cumulative prejudicial impact, nor is there a denial of due process. Dustin Dressner received a constitutionally fair trial. Consequently, we find this argument also lacks merit.

APPENDIX C

SUPREME COURT OF LOUISIANA

STATE OF LOUISIANA

v.

DUSTIN DRESSNER

2008-KA-1366 (La. 09/03/2010); __ So. 2d __.

Rehearing Denied.

181 ③

Supreme Court, U.S.
FILED
FEB 1 - 2011
OFFICE OF THE CLERK

No. 10-752

In The
Supreme Court of the United States

◆

DUSTIN DRESSNER,

Petitioner,

v.

STATE OF LOUISIANA,

Respondent.

◆

On Petition For A Writ Of Certiorari To The Louisiana Supreme Court

◆

BRIEF IN OPPOSITION TO THE PETITION FOR CERTIORARI

◆

PAUL D. CONNICK, JR.
District Attorney
Jefferson Parish
State of Louisiana

JULIET L. CLARK*
TERRY M. BOUDREAUX
Assistant District Attorneys
Office of the District Attorney
200 Derbigny Street
Gretna, Louisiana 70053
(504) 368-1020
jclark@jpda.us

**Counsel of Record for Respondent*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

CAPITAL CASE

QUESTIONS PRESENTED FOR REVIEW

Whether the Louisiana Supreme Court's *Batson* analysis so contravened this Court's rulings in *Miller-El v. Dretke*, 545 U.S. 231 (2005), and *Snyder v. Louisiana*, 552 U.S. 472 (2008), that it has decided an important federal question in a way that conflicts with relevant decisions of this Court.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

OPINION BELOW 1

JURISDICTION 1

STATEMENT OF THE CASE 1

SUMMARY OF THE ARGUMENT 5

ARGUMENT 6

- I. The Louisiana Supreme Court's Opinion Comports With This Court's Opinions in *Miller-El II* and *Snyder* 7
- II. The Louisiana Supreme Court Properly Affirmed the Trial Court's Ruling Denying Petitioner's *Batson* Challenges 12
- III. The Louisiana Supreme Court's Review of the Defense's Peremptory Strike Does Not Reinforce a Double Standard 19

CONCLUSION 21

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986) 5, 6, 7, 12

J.E.B. v. Alabama, 511 U.S. 127, 114 S. Ct. 1419, 128 L. Ed. 2d 89 (1994) 15

Miller-El v. Dretke, 545 U.S. 231, 125 S. Ct. 2317, 162 L. Ed. 2d 196 (2005) 7

Purkett v. Elem, 514 U.S. 765, 115 S. Ct. 1769, 131 L. Ed. 2d 834 (1995) 6

Rice v. Collins, 546 U.S. 333, 126 S. Ct. 969, 163 L. Ed. 2d 824 (2006) 13

Rivera v. Illinois, ___ U.S. ___, 129 S. Ct. 1446, 173 L. Ed. 2d 320 (2009) 20

Snyder v. Louisiana, 552 U.S. 472, 128 S. Ct. 1203, 170 L. Ed. 2d 175 (2008) 6, 7

CONSTITUTIONAL PROVISION

U.S. Const. amend. XIV 15

STATUTES

28 U.S.C. § 1257(a) 1

OPINION BELOW

The June 6, 2010 decision of the Louisiana Supreme Court is reported at 45 So. 3d 127 (La. 2010). Pet. App. 1A-78A. An appendix to the opinion of the Louisiana Supreme Court is unreported. Pet. App. 79A-198A.

◆

JURISDICTION

The judgment of the Louisiana Supreme Court was entered on June 6, 2010. That court denied petitioner's timely petition for rehearing on September 3, 2010. Pet. App. 199A. This Court has jurisdiction under 28 U.S.C. § 1257(a).

◆

STATEMENT OF THE CASE

The crime for which petitioner was convicted occurred on June 6, 2002. Paul and Shannon Fasullo were at home with their two-year-old daughter, Samantha, when Dustin Dressner unexpectedly arrived at their door accompanied by Kellen Parker. Forcing their way into the residence, Dressner and Parker attacked the Fasullos with steak knives, inflicting a lethal wound to Paul Fasullo's chest and stabbing Shannon Fasullo approximately twenty times. During the incident, Shannon was able to flee into a bedroom, dial 911 and scream her address before the defendant and Parker renewed their attack on her, at which point she tossed the cordless phone under a bed while the 911 call was still engaged. Thus, as noted by the Louisiana Supreme Court, "[t]he murderous mayhem was recorded on tape, including Shannon's screams, baby Samantha's frightened cries, and in places, defendant's own voice saying 'this bitch won't die.'" Pet. App. 8A.

On August 1, 2002, a Jefferson Parish grand jury returned an indictment charging Dressner and co-defendant Parker with one count of first degree murder, a capital offense, in violation of La. R.S. 14:30.

Voir dire began on May 17, 2004 and took three days to complete. The selection of jurors proceeded in the following manner. During the death qualification phase of jury selection, prospective jurors were questioned in six groups comprised of eighteen to twenty-six prospective jurors to allow the parties to exercise challenges for cause. After all cause challenges were made, 82 prospective jurors remained, including 16 black prospective jurors.[1]

When the regular *voir dire* commenced, the first twenty-four prospective jurors, including six black prospective jurors, were called as a panel and examined by the attorneys for the State and the defendant.

---

[1] Representations made in the instant opposition are based upon the prospective jurors' responses to a juror questionnaire which required the individual prospective jurors to identify their race. The questionnaires are exhibits to the State appellate record in this matter.

After the court ruled upon challenges for cause, sixteen prospective jurors remained, including five black prospective jurors (Derrick Burns, Van Durio, Tammie Frazier, Pamela Parker, and Jakeitha Patterson). The State exercised three peremptory challenges to remove Tammie Frazier, Pamela Parker, and Jakeitha Patterson, and the defendant exercised five peremptory challenges to remove white prospective jurors.[2] At the conclusion of this first panel of the regular *voir dire*, eight jurors had been tentatively selected, including two black males (Derrick Burns and Van Durio), one white male (Edwin Vicknair), and five white females (Kristine Monie, Karen Rine, Erica Costello, Renee Kinchen, and Gwendolyn Nettles).

A second group of twenty-four prospective jurors, including seven black prospective jurors, was then called as a panel and examined by the parties. After the trial court ruled upon cause challenges, sixteen prospective jurors remained, including five black prospective jurors (Selina Paul, Robert Ratcliff, Gejoan Garrett, Joseph Woods and Gemayel Holloway). The State exercised six peremptory challenges to remove four black prospective jurors (Selina Paul, Robert Ratcliff, Gejoan Garrett and Joseph Woods) and two white prospective jurors (Martina Sakryd and Sandra Castellanos). The defendant used three peremptory challenges including one backstrike, to remove (tentatively selected) black prospective juror Derrick Burns and white prospective jurors Bert Robles and Margaret Clawson. The resulting twelve person jury consisted of one black male (Van Durio), one white male (Edwin Vicknair) and ten white females (Kristine Monie, Karen Rine, Erica Costello, Renee Kinchen, Gwen Nettles, Gail Diket, Jessica Taylor, Versie Nicoll, Judy Barhorst and Jaelyn Burst).

---

[2] The defendant's peremptory challenges were used to remove white prospective jurors Frederick Munch, Peter Rigby, Dimiter Bocskov, Frank Hendrickson, and Katherine Werhan.

Alternate juror selection commenced with the State and defense being granted two peremptory challenges to exercise in the selection of two alternate jurors. The State used one of its two additional peremptories to remove black prospective juror Gemayel Hollaway and, as the second panel of the regular *voir dire* was exhausted without any alternate jurors having been selected, an additional group of fourteen prospective jurors, including two black prospective jurors, was called. The two black prospective jurors, Terri Smith and JoAnn Humphrey, were selected as the alternate jurors.

Opening statements commenced immediately after jury selection and trial continued through May 23, 2004, on which date the jury unanimously returned a verdict of guilty of first degree murder. Trial on the penalty phase was held on May 24, 2004 and the jury unanimously returned a verdict of death, finding the offense was committed in an especially heinous, atrocious, or cruel manner, and that defendant knowingly created a risk of death or great bodily harm to more than one person. The district court denied defendant's motion for new trial on October 21, 2004.

Dressner's conviction and sentence were affirmed by the Louisiana Supreme Court on direct appeal. *State v. Dressner*, 45 So. 3d 127 (La. 2010), *reh. denied* (La. 2010). Of significance, the court rejected the defendant's claim that the prosecution used some of its peremptory jury challenges based on race in violation of *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986). Dressner now seeks a writ of certiorari to review the judgment of the Louisiana Supreme Court, centering his complaints on the prosecution's strikes of four black jurors, Tammie Frazier, Selina Paul, Robert Ratcliff, and Joseph Woods.

◆

SUMMARY OF THE ARGUMENT

There is no merit to Dressner's contention that the Louisiana Supreme Court's analysis of his *Batson* claim conflicts with this Court's jurisprudence, or that the State's explanations for the exercise of its peremptories were insufficient and pretextual. A review of the record reveals that the trial court's rulings on the defendant's *Batson* claims were not clearly erroneous and were thus properly affirmed by the Louisiana Supreme Court.

◆

ARGUMENT

The exercise of peremptory challenges to exclude prospective jurors on the basis of race violates the Equal Protection Clause of the Fourteenth Amendment. *Batson v. Kentucky*, 476 U.S. 79, 84 106 S. Ct. 1712, 90 L. Ed. 2d 69. In *Batson*, this Court outlined a three-step process for evaluating claims of purposeful discrimination. *Id.* at 96-98. First, the defendant must make a prima facie showing of discrimination in the selection of the jurors. *Id.* at 96-97. If so, the prosecution must offer a race-neutral basis for striking the juror in question. *Id.* at 97-98. Finally, the trial court must determine whether the defendant has carried his burden of proving purposeful discrimination. The ultimate burden of persuasion regarding racial motivation rests with and never shifts from the opponent of the strike. *Purkett v. Elem,* 514 U.S. 765, 768, 115 S. Ct. 1769, 131 L. Ed. 2d 834 (1995) (per curiam).

"On appeal, a trial court's ruling on the issue of discriminatory intent must be sustained unless it is clearly erroneous." *Snyder v. Louisiana*, 552 U.S. 472, 477, 128 S. Ct. 1203, 170 L. Ed. 2d 175 (2008). This Court has noted that the trial court has a pivotal role in evaluating *Batson* claims because the third step of the *Batson* inquiry involves an evaluation of the prosecutor's credibility, and also because "race-neutral reasons for peremptory challenges often invoke a juror's demeanor (*e.g.,* nervousness, inattention), making the trial court's first hand observations of even greater importance." *Snyder v. Louisiana*, 552

U.S. 472, 128 S. Ct. 1203, 1208, 170 L. Ed. 2d 175 (2008).

I. The Louisiana Supreme Court's Opinion Comports With This Court's Opinions in *Miller-El II* and *Snyder*

First, Dressner contends that the Louisiana Supreme Court's opinion in this matter defies this Court's decisions in *Snyder* and *Miller-El v. Dretke*, 545 U.S. 231, 125 S. Ct. 2317, 162 L. Ed. 2d 196 (2005). More specifically, Dressner contends that the Louisiana Supreme Court supplied an additional reason to justify the State's exercise of a peremptory strike to remove prospective juror Tammie Frazier, ignored evidence that the State "mischaracterized" the testimony of prospective juror Selina Paul,[3] did not consider the "pro-State" character of certain race-neutral reasons as evidence of pretext, and ignored historical and statistical evidence. However, the record demonstrates that these claims do not warrant relief.

1. With regard to Tammie Frazier, the Louisiana Supreme Court correctly found that the trial court did not commit clear error in overruling Dressner's *Batson* objection. The prosecutor proffered the following race-neutral reasons for striking Ms. Frazier:

---

[3] Petitioner's claims with respect to Selina Paul are addressed in Part II, Section 1 of the instant opposition.

> With regard to Ms. Frazier, she also gave conflicting responses. She put B and D on the questionnaire. B is, I'm strongly in favor, and D is, I'm generally opposed. Furthermore, she stated yesterday, if I have to, I will. Not only that, Judge, she wasn't completely honest with us when she was filling out the questionnaire, because on the questionnaire, she neglected to indicate that she herself had been arrested for drugs. I don't feel comfortable. I don't feel that she is a strong death penalty juror.

(R., Vol. 10, pp. 2276-2277).[4] The trial court overruled defendant's objections stating, "Alright. I think the reasons are race neutral reasons that the court did observe on its own."

Of significance, Ms. Frazier did in fact circle "B" and "D" in response to question number thirty-one on the juror questionnaire, indicating that she was both strongly in favor of the death penalty and generally opposed to it.[5] When questioned regarding her contradictory responses, Ms. Frazier stated, "Well, if I have to, I could impose the death sentence." (R., Vol.

---

[4] As noted by the Louisiana Supreme Court, each of the prospective jurors was asked to complete a juror questionnaire which required them to disclose their opinion of capital punishment by circling responses "a" (I will always vote to impose the death penalty) through "f" (I would never vote to impose it). Pet. App. 96A.

[5] See, Juror Questionnaire of Tammie Frazier (R., Juror Questionnaires). The State did not accept any jurors who circled more than one response to Question 31.

7, p. 1545). However, as jurors are never *required* to impose a death sentence, Ms. Frazier's response supports the prosecutor's stated belief that she was not a strong death penalty juror.

Additionally, the record demonstrates that the prosecutor correctly stated that Ms. Frazier neglected to indicate on her juror questionnaire that she had been arrested on a drug charge, and only offered this information when the trial court advised the prospective jurors of the qualifications one must possess in order to serve on a jury. (R., Vol. 6, pp. 1400-1401). At that time, Ms. Frazier advised the court and the parties:

> I have a question. When I was about like – I was 29 years old, I was babysitting, and the police came in the house when I was babysitting, and they had drugs in the house, and I went to jail. I just wanted to know if that was a felony or what.

(R., Vol. 6, p. 1411). Ms. Frazier explained that she went to jail that night and to court, but ultimately was not prosecuted. (R., Vol. 6, pp. 1411-1412). Ms. Frazier's initial lack of candor as well as the fact of her drug arrest constitute valid, race-neutral reasons for the peremptory strike which are supported by the record.

While Petitioner contends that the Louisiana Supreme Court supplied additional reasons to support the State's peremptory strike, the record reflects that the Louisiana Supreme Court specifically found that Ms. Frazier's previous arrest for a drug offense provided a valid race-neutral reason for the State's peremptory strike. Pet. App. 98A. That the Louisiana Supreme Court found Ms. Frazier's brother's incarceration would also provide a race-neutral reason for the peremptory strike indicates that it considered the totality of the circumstances in evaluating the prosecutor's proffered race-neutral reasons. Moreover, the opinion's discussion of race-neutral challenges of jurors whose family members have been in trouble with the law was relevant, by extension, to the challenge of a prospective juror who had herself been in trouble with the law. This claim has no merit.

2. Further, there is no merit to Dressner's claim that the Louisiana Supreme Court defied this Court's jurisprudence in failing to consider the "pro-State" character of certain race-neutral reasons as evidence of pretext. More specifically, Dressner contends that a juror is expressing a "pro-State" view when he indicates he would require the defendant to put on a defense if the State's case is strong, or that he would be reluctant to afford the defendant the presumption of innocence. However, the State submits that it cannot be maintained that jurors who express a reluctance or unwillingness to follow the law are expressing a view that is pro-State. Instead, such statements provide ample grounds for concluding that a prospective juror may not make a very good juror.

3. Finally, there is no merit to Petitioner's claim that the Louisiana Supreme Court ignored historical

and statistical evidence of discrimination rendering it impossible to prove discriminatory intent where a prosecutor gives a race-neutral explanation for a peremptory strike. Indeed, the Louisiana Supreme Court specifically noted statistical evidence regarding the state's exercise of peremptory challenges in the instant case, stating:

> Notwithstanding the judge's apparent half-hearted finding of a pattern in the State's exercise of its peremptory challenges mid-stream in jury selection, finding the defense met its burden of establishing a prima facie showing under step one of *Batson* is borne out at the conclusion of jury selection. When the first twelve jurors had been chosen, the State used seven out of nine peremptory strikes against black jurors, or roughly 77% which clearly supports the district judge's finding the defense had established a pattern under *Batson's* first step.

Pet. App. 91A, fn.8.

Petitioner also contends that the Louisiana Supreme Court erred in failing to consider an alleged history of race discrimination by the Jefferson Parish District Attorney's Office, referring to a document attached as Exhibit A to his motion for new trial entitled "Blackstrikes." Pet. App. 20.[6] However, this document was not proffered to the trial court during the jury selection process, nor were there any representations made by defense counsel during the trial in this matter concerning a "history of discrimination" by either the District Attorney's Office or the prosecutors involved in the trial in this matter. As the defendant did not advance these arguments to the trial court at the time of his *Batson* objections in support of his burden of proving purposeful discrimination on the part of the State, it is the State's position that they are not properly considered on appeal.[7]

---

[6] (R., pp. 905-909).

Further, the Louisiana Supreme Court found no racial discrimination tainted jury selection in the instant case, notwithstanding any asserted historical precedent in Jefferson Parish to the contrary. Pet. App. 134A.

II. The Louisiana Supreme Court Properly Affirmed the Trial Court's Ruling Denying Petitioner's *Batson* Challenges.

Petitioner also contends that the State's explanations for its peremptories were insufficient and pretextual. Herein, petitioner centers his claim on the prosecution's strikes of three black prospective jurors, Selina Paul, Robert Ratcliff and Joseph Woods. However, the Louisiana Supreme Court properly found that the State provided valid, race-neutral reasons for peremptorily striking these prospective jurors and that no relief was warranted. Moreover, reversal is not warranted as review of the record reveals that the trial court did not commit clear error in overruling Petitioner's objections to the State's peremptory strikes.

---

[7] On appeal, the Louisiana Supreme Court noted that at the hearing on the motion for new trial, the prosecutor referred to the document as a "sham of a study by the Louisiana Crisis Assistance Center." Pet. App. 134A.

1. With respect to prospective juror Selina Paul, Dressner contends that the prosecutor's proffered race-neutral reasons are unsupported by the record, and/or do not survive comparative analysis with the responses of other jurors. Dressner also contends that the Louisiana Supreme Court erred in rejecting his claim that the fact that at least one of the prosecutor's reasons was not supported by the record was evidence of discriminatory intent. However, the failure of one race-neutral reason does not invalidate others, properly found. *Rice v. Collins*, 546 U.S. 333, 340-342, 126 S. Ct. 969, 163 L. Ed. 2d 824 (2006).

The prosecutor provided the following race-neutral reasons for his strike of Ms. Paul:

> With regard to Ms. Paul, Judge, she circled "D" on the questionnaire, and that question – I mean that response is, "I am generally opposed to the death penalty." In response to questioning by defense counsel yesterday, during the Witherspoon process, she answered definitely, and this answer was emphatic, definitely, I cannot consider mercy, when they were going through the mitigating circumstances. Furthermore, when I was

> giving the examples in my voir dire, she seemed to be confused with regard to intoxication and specific intent. Furthermore, Paul Fleming was questioning in this last panel. She volunteered information. Not once during my voir dire or any other questioning that I asked her, did she volunteer any information.

(R., Vol. 10, pp. 2448-2449). While the record admittedly does not support the prosecutor's statement that Ms. Paul said she could not consider mercy, the prosecutor's reasons were provided at the conclusion of the second round of the general *voir dire* and after six rounds of *Witherspoon voir dire*. Under these circumstances, the fact that the prosecutor confused one prospective juror's response is neither surprising, nor does it support the conclusion that the strike actually was based on race. Further, the Louisiana Supreme Court noted that Ms. Paul did appear to have difficulty grasping some of the legal concepts conveyed in *voir dire* and found that the remaining race-neutral reasons supported the strike. Pet. App. 109A-112A.

There is no merit to defendant's allegation that the State's claim that it struck Ms. Paul because she circled the letter "D," indicating she generally opposed the death penalty, does not survive comparative analysis. While the prosecutor accepted white prospective jurors Karen Rine, Renee Kinchen and Versie Nicolls who selected "D" in response to Question 31, they did not display confusion regarding intoxication and intent. The State did strike a white prospective juror (Martina Sakryd) who picked "D," and could not have struck every juror who picked "D" without exhausting the State's peremptory challenges midway through the second round of *voir dire* at a point when the defendant had four remaining peremptories and could have seated objectionable jurors including a prospective juror (Thanh Tran) whose response to the questionnaire indicated he was "strongly opposed to the death penalty and would have a difficult time voting to impose it, regardless of the facts or circumstances."

2. Dressner also contends that the State's proffered reasons for striking Robert Ratcliff relied upon gender in violation of the Equal Protection Clause of the Fourteenth Amendment, citing *J.E.B. v. Alabama*, 511 U.S. 127, 140, 114 S. Ct. 1419, 128 L. Ed. 2d 89 (1994). However, the Louisiana Supreme Court properly found that this claim was not properly before it because Petitioner failed to raise an objection based on gender in the trial court. Pet. App. 119A.

Even if this claim had been raised in the trial court and properly presented to the Louisiana Supreme Court on appeal, it would be meritless. The prosecutor's proffered reasons for striking Mr. Ratcliff were as follows:

> Okay. I'm striking Mr. Ratcliff, 1) because he did give me responses of some concern, week [sic] on the death penalty. Second of all, he is

> a deacon in his church . . . He is a deacon in his church. During his questioning, he reflects that he works with kids in the Jefferson Parish School System, Judge. Both Mr. Rowan and I got the impression that he would be sympathetic to the defendant, given that the defendant is a young male. And by all indications, the defense is going one, intoxication in guilt; two, they've put everybody on notice through voir dire that they intend to bring intoxication and mental defect in at the penalty phase. Given this position with regard to one being a deacon and highly involved with children, we think that he's week [sic] on the death penalty because he's going to be more into rehabilitation that he would be able to punish. Third, Your Honor, when [defense counsel] asked him what church he was a deacon in, he said Jesus is Lord Evangelical Ministries. Such churches opt to seek out at risk people . . . And try to work with them and try to convert them to their faith and bring them into their fold. For all these reasons, we think that it's highly likely that he won't vote for the death penalty. And then on top of that, his response to the Fifth Amendment, he had a problem in potentially following the law.

(R., Vol. 10, pp. 2459-2460). Read in context, the prosecutor characterized the defendant as a young man while explaining why the fact that the prospective juror worked with children in the school system factored into his decision to strike the juror. The fact that the defense did not raise a gender based challenge in response to this remark is further evidence that the parties understood the remark in this context. The prosecutor did not impermissibly strike Mr. Ratcliff because of his gender.

3. Finally, Dressner contends that the State's reasons for striking prospective juror Joseph Woods were pretextual and insufficient. This claim likewise merits no relief. The prosecutor offered several race-neutral reasons for striking Joseph Woods:

> Judge, when talking about the Fifth Amendment privilege, and his response to my question was – we're talking about whether or not the defense decides to present evidence and/or whether or not he would require the defendant to testify. He said, I have a son that is right about the defendant's age, and we've got some real concerns there. We feel that he would be highly sympathetic to the defendant given that the defendant is approximately the same age as his son. Furthermore, for similar reasons given by the defense in striking Mr. Burns from the first panel, his language, he might not hold it against him, but – and I think that eventually I've got some concerns. The greater concern is that he might identify with the defendant. He also circled D – he also circled C, which puts him right in the middle.

(R., Vol. 10, p. 2472). The trial court noted that these were "valid reasons that this Court has independently witnessed." *Id.*

Of significance, the record provides ample support for the State's peremptory strike of Mr. Woods. In response to Question 31 on the Juror Questionnaire, Mr. Woods circled "D," indicating his general opposition to the death penalty, and also "C," indicating he was generally in favor of the death penalty.[8] The State did not accept any jurors who selected more than one response to Question 31 on the juror questionnaire, and only accepted three jurors who marked "D," indicating their general opposition to the death penalty.[9] Also the record reflects that Mr. Woods wanted to hear from the defendant, "Cause I have a son about his age, old like he is. I know I like my son. I'm pretty sure other people like their son too." (R., Vol. 10, p. 2337). Mr. Woods repeated this statement a few moments later. (R., Vol. 10, p. 2337). These comments reflect that Mr. Woods identified the defendant with his own son of approximately the same age. It is readily apparent that the State would seek to excuse a prospective juror who explicitly compared a criminal defendant in a capital case to the juror's own son.

While the defendant contends that the State failed to strike other prospective jurors with children near in age to the defendant, he fails to identify any other juror who referenced his own child when speaking about the defendant. This claim does not warrant relief.

---

[8] (R., Juror Questionnaire).

[9] (R., Juror Questionnaires).

III. The Louisiana Supreme Court's Review of the Defense's Peremptory Strike Does Not Reinforce a Double Standard.

Of significance, there is no merit that the trial court scrutinized the defendant's peremptory strike of white prospective juror Jaelyn Burst more carefully than the State s strikes. Instead, the record reflects that when asked to provide gender neutral reasons for striking Ms. Burst, defense counsel noted that "his colleague" noted that she tended to agree with the prosecutor when he was speaking and that she had identified herself on the Juror Questionnaire as a Christian and a Republican. (R., Vol. 10, pp. 2475-2477). However, the Question 28 on the Juror Questionnaire actually asked the prospective jurors to indicate whether they were married and to provide information concerning **their spouse** including political party and religious affiliation.[10] The trial court appeared to recall that the prospective jurors were not requested to state their own religion and political affiliation, stating, "Is that her questionnaire? May I see it. I think [that] wasn't the question – you know that, right?" (R., Vol. 10, pp. 2475-2477). Defense counsel stated, "Yes, sir." *Id.* Then defense counsel stated,

> [The prosecutor] has a way of endearing himself. He's a great looking guy, endearing himself to the female jurors – . . . and I

---

[10] (R., Juror Questionnaires).

> noticed it. I noticed her – I think she was nodding with Mr. Mary and she sort of was in his corner. We believe she is pro State and has endeared herself to Mr. Mary.

Id. The trial court granted the State's objection, having found the defendant's demeanor based objection to be unsupported. The State submits that Dressner's demeanor based reason was not gender neutral as it explicitly invoked Ms. Burst's gender as a basis for striking her.

Of significance, the Louisiana Supreme Court found that, assuming *arguendo* the trial court erred in denying defendant's peremptory challenge of Burst, his claim in this regard failed on the merits in light of this Court's decision in *Rivera v. Illinois*, ___ U.S. ___, 129 S. Ct. 1446, 173, L. Ed. 2d 320 (2009) (Loss of a peremptory challenge due to a state court's good faith error not a matter of federal constitutional concern where defendant tried before a qualified jury composed of individuals not challengeable for cause.) Pet. App. 149 A. The fact that the Louisiana Supreme Court also noted that defense counsel's articulation regarding Burst was "decidedly weak" does not support the conclusion that it reviewed the defendant's peremptory challenge with greater scrutiny than the State's. *Id.* This claim has no merit.

◆

CONCLUSION

The petitioner has failed to show that any of the issues raised herein necessitate the granting of certiorari. The State of Louisiana requests that, for the foregoing reasons, the petition for writ of certiorari be denied.

Respectfully submitted,

PAUL D. CONNICK, JR.
District Attorney
Jefferson Parish
State of Louisiana

JULIET L. CLARK*
TERRY M. BOUDREAUX
Assistant District Attorneys
Office of the District Attorney
200 Derbigny Street
Gretna, Louisiana 70053
(504) 368-1020
jclark@jpda.us

**Counsel of Record*
for Respondent

R1 ④

Supreme Court, U.S.
FILED
FEB 9 - 2011
OFFICE OF THE CLERK

No. 10-752

IN THE
Supreme Court of the United States

DUSTIN DRESSNER,
Petitioner,

v.

STATE OF LOUISIANA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE LOUISIANA SUPREME COURT

BRIEF IN REPLY TO OPPOSITION

G. BEN COHEN*
BIDISH SARMA

THE CAPITAL APPEALS PROJECT
636 Baronne Street
New Orleans, LA 70113
(504) 529-5955
benc@thejusticecenter.org

**Counsel of Record for Petitioner*

LEGAL PRINTERS LLC, Washington DC • 202-747-2400 • legalprinters.com

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

BRIEF IN REPLY TO OPPOSITION 1

I. The State's Brief Repeats the Lower Courts' Erroneous Assertion that Statistical Evidence and Historical Evidence Have No Bearing at *Batson*'s Third Step 2

II. The State Continues to Employ Implausible and Fantastic Justifications, and Ignores the Revealing Side-by-Side Analysis of Similarly-Situated African-American and White Jurors 4

CONCLUSION 7

TABLE OF AUTHORITIES

Cases

Batson v. Kentucky, 476 U.S. 79 (1986)............*passim*

Miller-El v. Cockrell, 537 U.S. 322 (2003)........*passim*

Miller-El v. Dretke, 545 U.S. 231 (2005) ....*passim*

Snyder v. Louisiana, 552 U.S. 472 (2008)..............1, 5

Miscellaneous

Brief of Louisiana Association of Criminal Defense Lawyers, as Amicus Curiae Supporting Petitioner 1, 2

BRIEF IN REPLY TO OPPOSITION

Dustin Dressner hereby submits this Brief in Reply in support of his petition for a writ of certiorari, filed December 2, 2010.

The State's *Brief in Opposition* [hereinafter "*BIO*"] does not dispute Petitioner's assertion that this is an important case, worthy of consideration. Nor does it address the *amicus* brief filed by the Louisiana Association of Criminal Defense Lawyers which observed that this is a significant issue, and that there is a recurring problem in the Louisiana courts where prosecutors' peremptory strikes against African-Americans uniformly survive appellate review, no matter how much circumstantial evidence of discrimination the defendant presents. Instead, the State defends the Louisiana Supreme Court's *Batson* ruling on its merits, implicitly conceding that this issue warrants review.

Petitioner's reasons for granting the writ remain uncontested: the Louisiana Supreme Court has not heeded the guidance this Court provided in *Snyder* and *Miller-El*. Instead, it "has decided an important federal question in a way that conflicts with relevant decisions of this Court." This case presents a timely opportunity to ensure that *Batson* retains vitality.

The Louisiana Supreme Court's opinion stands for the proposition that the race-neutrality of a prosecutor's step-two explanations suffices once and for all at step-three of the process. In defending that opinion, the *BIO* confirms the view that statistical and historical evidence is irrelevant to the third-step determination; exalts explanations that applied to prospective white jurors the State did not strike; and disregards record-bound evidence demonstrating the State's dissimilar treatment of African-American and white jurors. Race is the only reasonable explanation for the State's strikes. The *BIO* replicates the Louisiana's courts' legal-gymnastics to avoid that conclusion.

I. The State's Brief Repeats the Lower Courts' Erroneous Assertion that Statistical Evidence and Historical Evidence Have No Bearing at *Batson*'s Third Step

The *BIO* asserts that the Louisiana Supreme Court sufficiently considered statistical evidence because it affirmed the trial court's finding of a *prima facie* case. *See BIO* at 11 (citing Pet. App. 91A, fn.8). This argument epitomizes the lower courts' error, which the *amicus* described clearly. *See Amicus* at 13 ("Instead of looking beyond the four corners of a case to determine whether stated reasons are false, the Louisiana Supreme Court determines that the stated reasons are not false so that it does not have to look beyond the four corners of the case."). Statistical evidence is not only relevant to the step-one determination, but also to the finding at step-three of *Batson*.

At trial, the State struck seven of nine qualified African-American jurors. As this Court made clear in *Miller-El v. Cockrell*, 537 U.S. 322 (2003), and *Miller-El v. Dretke*, 545 U.S. 231 (2005), statistics like these provide powerful evidence bearing on the ultimate question of whether strikes were racially motivated.

In addition to ignoring the step-three relevance of statistical evidence, the State claims that the historical evidence of discrimination in Jefferson Parish was neither relevant nor properly presented. However, the Louisiana Supreme Court decided the claim on the merits, effectively holding that the race-neutrality of the State's reasons necessarily overrode the significance of history.[1] *See* Pet. App. B at 134A. As with its analysis of statistical evidence, the Louisiana Supreme Court's approach undermines *Miller-El*, and renders it impossible to prove a *Batson* violation unless the prosecutor fails to articulate any race-neutral explanation for her peremptory strike.

Under the Louisiana Supreme Court's opinion, historical evidence, statistical evidence, and comparative juror analysis cannot establish a *Batson* violation; the only evidence that could prevail in response to a race neutral explanation at step-two would be direct evidence of discrimination.

---

[1] The historical evidence was properly presented to the trial court at the hearing on the *Motion for New Trial*. The trial court heard and rejected the Petitioner's renewed *Batson* claim.

II. The State Continues to Employ Implausible and Fantastic Justifications, and Ignores the Revealing Side-by-Side Analysis of Similarly-Situated African-American and White Jurors

Petitioner argued that the prosecutor's claims that he struck prospective African-American jurors because of their pro-State characteristics were implausible and pretextual.[2] The State responded, "it cannot be maintained that jurors who express a reluctance . . . to follow the law are expressing a view that is pro-State. Instead, such statements provide ample grounds for concluding that a [person] may not make a very good juror." *BIO* at 10.[3]

However, the State fails to explain why it peremptorily challenged 88% (seven of eight[4]) of the African-American jurors who initially indicated that they may hold against the defendant his exercise of his Fifth Amendment rights, but struck 0% of the white jurors (zero of six[5]) who provided a similar response. Not only did the State fail to strike similarly situated white jurors, but it also objected to defense cause-challenges to white jurors who indicated they may be unable to meaningfully consider mitigating circumstances.[6] The *BIO* provides no explanation – nor could it – concerning the State's conflicting efforts to strike African-Americans who provided pro-State answers and to protect similarly-situated whites from defense cause-challenges. These contrary actions provide clear evidence of discriminatory intent.

---

[2] These pro-State characteristics include a desire to hear the defendant testify in his own defense and an initial reluctance to accord the defendant his presumption of innocence.

[3] None of the peremptorily-stricken African-American jurors were removable for cause, despite any initial reservations they expressed about the Fifth Amendment.

[4] The State gave the Fifth Amendment as a reason for its strikes against Ms. Parker, Mr. Holloway, Mr. Woods, and Mr. Ratcliff, who all made some indication that they would want to hear from the defendant or want him to put on a case. The State also struck Ms. Frazier, Ms. Patterson, and Ms. Garrett who all suggested they would also want to hear from the defendant. R. 2118, 2125, 2323.

The Louisiana Supreme Court and *BIO* fail to conduct or engage with the comparative juror analysis outlined in *Snyder* and *Miller-El*. This analysis reflects disparate treatment of prospective African-American and white jurors: a side-by-side analysis of Selina Paul and Karen Rine makes plain that the only basis for striking Ms. Paul and not Ms. Rine was race. *See Petition for Certiorari* at 29-30. Much like this Court's comparison between Mr. Brooks and Mr. Laws in *Snyder v. Louisiana*, 552 U.S. 472, 483-84 (2008), the contrast establishes the implausibility of the State's explanations. Ms. Rine – not Ms. Paul – was the only juror to whom all four of the State's reasons for striking Ms. Paul actually applied: she circled the letter "D"; she would have trouble considering mercy; she was confused during voir dire; and she volunteered information to defense counsel.

---

[5] Ms. Monie and Ms. Barhorst both indicated that they would want to hear from the defendant. Additionally, Mr. Hendrickson, Mr. Munch, Ms. Diket, and Mr. Robles expressed that they would be curious if someone did not defend himself at trial. R. 2129, 2135, 2198, 2320, 2373

[6] *See* R. 1589-92 (Frank Hendrickson); R. 2417 (Frank Noto and Shane Cotham).

The *BIO* acknowledges – as the Louisiana Supreme Court recognized – that the trial prosecutor mischaracterized Ms. Paul's responses and struck her, yet allowed Ms. Rine to serve. *See BIO* at 14 ("the record admittedly does not support the prosecutor's statement that Ms. Paul said she could not consider mercy"). But, like the Louisiana Supreme Court, the *BIO* suggests that the error has no bearing in the step-three analysis. While the State's candor concerning the deficiency of the prosecutor's explanation should be applauded, its silence on its ultimate relevance underscores the indefensibility of the trial prosecutor's explanations.

CONCLUSION

The petition for a writ of certiorari raises an important question, and should be granted. This Court should summarily reverse the Louisiana Supreme Court's opinion based on the clear error committed below.

Respectfully submitted,

G. Ben Cohen*
Bidish Sarma

The Capital Appeals Project
636 Baronne Street
New Orleans, LA 70113
(504) 529-5955
benc@thejusticecenter.org

*Counsel of Record for Petitioner

179

②

No. 10-752

Supreme Court, U.S.
FILED
JAN 5 - 2011
OFFICE OF THE CLERK

In The
Supreme Court of the United States

◆

DUSTIN DRESSNER,

Petitioner,

v.

STATE OF LOUISIANA,

Respondent.

◆

On Petition For A Writ Of Certiorari To The Louisiana Supreme Court

◆

AMICUS BRIEF IN SUPPORT OF PETITIONER BY THE LOUISIANA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

◆

EDWARD KING ALEXANDER, JR.*
901 Lakeshore Drive, Suite 700
Lake Charles, LA 70602
(337) 436-1718
ekalexander@pdolaw.org

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTERESTS OF *AMICI CURIAE* 1

INTRODUCTION AND SUMMARY OF THE ARGUMENT 1

ARGUMENT 4

I. The review of Louisiana appellate jurisprudence conducted in support of the grant of certiorari in *Snyder* 4

II. A review of Louisiana appellate jurisprudence conducted since this Court decided *Snyder* shows that matters have become worse, not better 6

III. The Louisiana Supreme Court has adopted a method for considering historical and statistical evidence of discriminatory intent at odds with *Miller-el* and the other holdings of this Court 11

IV. Trial court scrutiny has not improved and appellate review has only become more deferential in the wake of *Snyder* 17

CONCLUSION 19

TABLE OF AUTHORITIES

Page

CASES

Batson v. Kentucky, 476 U.S. 79 (1986) .... *passim*

Georgia v. McCollum, 505 U.S. 42 (1992) 5, 9

Miller-el v. Dretke, 545 U.S. 231 (2005) 6, 11, 12

Snyder v. Louisiana, 552 U.S. 472 (2008) .... *passim*

State v. Ball, 748 So. 2d 1239 (La. App. 2 Cir. 1999) 10

State v. Bess, 47 So. 3d 524 (La. App. 2 Cir. 2010) 8

State v. Brastfield, 3 So. 3d 9 (La. App. 4 Cir. 2008) 9, 18

State v. Breaux, No. 45,676-KA, 2010 La. App. LEXIS 1506 (La. App. 2 Cir. Nov. 3, 2010) 10

State v. Collins, 12 So. 3d 1069 (La. App. 2 Cir. 2009) 9, 17

State v. Dressner, ___ So. 3d ___ (La. 2010); 08-1366 (La. 07/06/10); 2010 La. LEXIS 1656 ..... *passim*

State v. Dunn, 831 So. 2d 862 (La. 2002) 10

State v. Eubanks, 232 La. 289 (La. 1957), *rev'd*, *Eubanks v. Louisiana*, 356 U.S. 584 (1958) 4

State v. Ford, 643 So. 2d 293 (La. App. 2 Cir. 1994) 10

State v. Harmon, No. 08-454, 2008 La. App. Unpub. LEXIS 580 (La. App. 3 Cir. Nov. 5, 2008) 9

TABLE OF AUTHORITIES – Continued

Page

State v. Holder, 25 So. 3d 920 (La. App. 2 Cir. 2009), *writ denied*, *State ex rel. Johnson v. State*, No. 2009-KH-2788, 2010 La. LEXIS 2854 (La. Dec. 10, 2010) 9

State v. Horn, No. 45,706-KA, 2010 La. App. LEXIS 1502 (La. App. 2 Cir. Nov. 3, 2010) 8, 18

State v. Jackson, No. 08-428, 2008 La. App. Unpub. LEXIS 588 (La. App. 3 Cir. 2008) 9, 10

State v. Jacobs, 6 So. 3d 315 (La. App. 3 Cir. 2009) 10

State v. Jacobs, 13 So. 3d 677 (La. App. 5 Cir. 2009), *vacated*, 32 So. 3d 227 (La. 2010) (per curiam) 7, 8, 9

State v. Jacobs, 32 So. 3d 227 (La. 2010) (per curiam), *reh'g denied*, 37 So. 3d 994 (La. 2010) (per curiam) 7, 9, 14, 19

State v. Joseph, 45 La. Ann. 903 (La. 1893) 3

State v. Kidd, No. 45,638-KA, 2010 La. App. LEXIS 1509 (La. App. 2 Cir. Nov. 3, 2010) 8

State v. Moore, 640 So. 2d 561 (La. App. 3 Cir. 1994) 10

State v. Nelson, 41 So. 3d 642 (La. App. 2 Cir. 2010) 10

State v. Palms, No. 08-553, 2008 La. App. Unpub. LEXIS 676 (La. App. 3 Cir. 2008), *writ denied*, 36 So. 3d 241 (La. 2010) 9

State v. Payne, 657 So. 2d 531 (La. App. 4 Cir. 1995) 10

TABLE OF AUTHORITIES – Continued

Page

State v. Pierre, 189 La. 764 (La. 1938), *rev'd*, *Pierre v. Louisiana*, 306 U.S. 354 (1939)....................4

State v. Plauche, 32 So. 3d 852 (La. App. 3 Cir. 2010), *writ denied*, 45 So. 3d 1070 (La. 2010)..........8

State v. Prejean, No. 2009 KA 0878, 2009 La. App. Unpub. LEXIS 639 (La. App. 1 Cir. Oct. 27, 2009)..10

State v. Sarpy, No. 10-700, 2010 La. App. LEXIS 1650 (La. App. 3 Cir. Dec. 8, 2010)...............8

State v. Scott, 921 So. 2d 904 (La. 2006)....................10

State v. Singleton, 953 So. 2d 168 (La. App. 3 Cir. 2007)..10

State v. Snyder, 874 So. 2d 739 (2004)........................7

State v. Spencer, 631 So. 2d 1363 (La. App. 5 Cir. 1994)..10

State v. Stewart, 866 So. 2d 1016 (La. App. 5 Cir. 2004)..10

State v. Tyler, 723 So. 2d 939 (La. 1998)....................10

State v. Wade, 832 So. 2d 977 (La. App. 2 Cir. 2002)..10

State v. White, 850 So. 2d 751 (La. App. 2 Cir. 2003)..10

State v. Williams, No. 45,755-KA, 2010 La. App. LEXIS 1536 (La. App. 2 Cir. Nov. 3, 2010)..8

State v. Wilson, 28 So. 3d 394 (La. App. 5 Cir. 2009), *writ denied*, 38 So. 3d 299 (La. 2010)......9, 17

Page

State v. Wilson, 632 So. 2d 861 (La. App. 2 Cir. 1994) 10

Strauder v. W. Va., 100 U.S. 303 (1880) 3

Village of Willowbrook v. Olech, 528 U.S. 562 (2000) 6

Wyatt v. Hendrix, 998 So. 2d 233 (La. App. 2 Cir. 2008) 10

OTHER AUTHORITIES

"Illegal Racial Discrimination in Jury Selection: A Continuing Legacy," Equal Justice Initiative, August 2010, available at http://eji.org/eji/files/62510%20Edited%20Tutwiler%20version%20Final%20Report%20from%20printer%20online.pdf (last viewed January 4, 2011) 16

Lee v. Louisiana, 07-1523, *Brief of Amicus Curiae*, Louisiana Criminal Defense Attorneys 3

"Race and Jury Selection," Equal Justice Initiative at http://www.eji.org/eji/raceandpoverty/juryselection (last viewed January 4, 2011) 16

Snyder v. Louisiana, 2006 U.S. Briefs 10119, *Brief of Amicus Curiae, Louisiana Association of Criminal Defense Lawyers* 4, 5

TABLE OF AUTHORITIES – Continued

Page

State of Louisiana v. Felton Dorsey, No. 2010-KA-0216, Record at 6036-6037, Appeal from Conviction and Death Sentence Imposed, 1st JDC District Ct. No. 251,406 (appeal pending) 16

Cecelia Trenticosta & William C. Collins, *Death and Dixie: How the Courthouse Confederate Flag Influences Capital Cases in Louisiana*, 27 Harv. J. Racial & Ethnic Just. (forthcoming 2011), *available at* http://ssrn.com/abstract=1734397 16

INTERESTS OF *AMICI CURIAE*[1]

The Louisiana Association of Criminal Defense Lawyers (LACDL) is a voluntary professional organization of private and public defense attorneys practicing in Louisiana. LACDL counts among its members the vast majority of Louisiana's criminal defense bar. LACDL's mission includes the protection of individual rights guaranteed by the Louisiana and United States Constitutions. LACDL has given particular attention to discrimination based upon race and gender in jury selection and composition, providing an *amicus* brief to this Court in *Snyder v. Louisiana*.

LACDL has an interest separate from the Petitioner and Respondent. *Amicus curiae* respectfully suggest that this Court grant the Petition to consider in full the Louisiana court's application of *Batson v. Kentucky*.

◆

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Previously the LACDL provided this Court with an *amicus* brief in support of the petition for certiorari arising from the *Batson*[2] claim in *Snyder v. Louisiana*, 552 U.S. 472 (2008). In that brief, *amici* sought to assist the Court by explaining the historical failure of Louisiana reviewing courts to identify and remedy racial discrimination in jury selection.

---

[1] Pursuant to this Court's Rule 37, *amici* state that no counsel for any party authored this brief in whole or in part, and no person or entity other than *amici* made a monetary contribution to the preparation or submission of the brief. Counsel of record for all parties were timely notified and have consented to the filing of this brief.

This Court granted certiorari in *Snyder* and ultimately granted relief, finding that the trial judge had committed clear error in denying Mr. Snyder's *Batson* challenge. This should have been a watershed moment in Louisiana jurisprudence as this Court's finding contrasted so markedly with the findings of the Louisiana Supreme Court which had twice found that not only was there not clear error but that it agreed with the trial court.

Unfortunately, this Court's opinion in *Snyder* has not served as a watershed in Louisiana's *Batson* jurisprudence and since the *Snyder* opinion, matters have become, if anything, worse.

In this brief *amici* updates the review of appellate practice in Louisiana by studying the cases decided since *Snyder* was announced. That review shows that no defendant has received relief under *Batson*, that there has been an apparent explosion in "reverse-*Batson*" rulings involving findings of discrimination against white jurors by defense lawyers, and that in the one case where *Batson* relief was temporarily granted by a Louisiana appellate court after *Snyder*, the Louisiana Supreme Court reversed the grant of relief without briefing or argument.

---

[2] *Batson v. Kentucky*, 476 U.S. 79 (1986).

The review also demonstrates that the problems with Louisiana's *Batson* jurisprudence stretch much further than the number of denials. In the wake of *Snyder*, the Louisiana Supreme Court has developed a form of analysis in relation to statistical and historical evidence of discrimination at odds with this Court's holdings and fatal to the use of such evidence in *Batson* claims. Rather than encouraging increased and meaningful scrutiny in the *Batson* process following *Snyder*, the Louisiana Supreme Court has endorsed patently inadequate review and has elevated appellate deference to a point that renders review meaningless. Rather than *Snyder* opening the door to a more *Batson* friendly approach in Louisiana, it has seen an explosion of reverse-*Batson* cases.

From the outset, Louisiana has had trouble giving effect to the reach of the Fourteenth Amendment's Equal Protection Clause to jury selection.[3]

---

[3] A little over a decade after *Strauder v. W. Va.*, 100 U.S. 303 (1880) the Louisiana Supreme Court decided *State v. Joseph*, 45 La. Ann. 903 (La. 1893), rendering *Strauder* virtually meaningless. Five years after that Louisiana passed its infamous 1898 constitution, disenfranchising African Americans and introducing a majority verdict system to ensure that *Strauder* did not undermine white decision making on juries. *Lee v. Louisiana*, 07-1523, *Brief of Amicus Curiae*, Louisiana Criminal Defense Attorneys (concerning Louisiana's non-unanimous jury verdicts, noting the avowed intent of the leaders of the 1898 Louisiana Constitutional Convention was to shroud the administration of

(Continued on following page)

The Louisiana Supreme Court has a regrettable history in this regard[4] and unfortunately that history of recalcitrance appears to be repeating itself.

This Court should grant certiorari to review the decision in this case and to finish the work it started in *Snyder* – the work of ensuring that *Batson*'s prescription and this Court's holdings reach into Louisiana.

◆

ARGUMENT

I. The review of Louisiana appellate jurisprudence conducted in support of the grant of certiorari in *Snyder*

Prior to the grant of certiorari in *Snyder*, *amici* reviewed the appellate practice in Louisiana in *Batson* cases. In its *amicus* brief in support of the grant of certiorari in *Snyder*, *amici* reported several disturbing findings.

First, that since *Batson* was announced, the intermediate appellate courts in Louisiana had reviewed 178 trial court denials of defense *Batson* challenges and have granted relief to the defendant in only four

---

justice with race-neutral language that effected and ensured white hegemony).

[4] *See, for example, State v. Pierre*, 189 La 764, 771-2 & 775 (La. 1938), *rev'd, Pierre v. Louisiana*, 306 U.S. 354 (1939); *State v. Eubanks*, 232 La. 289, 296 (La. 1957), *rev'd, Eubanks v. Louisiana*, 356 U.S. 584, 586 (1958).

of those cases (with one of those subsequently reversed by the Louisiana Supreme Court).[5]

Second, that since *Batson* there had been thirty-two cases where the Louisiana Supreme Court had considered a defendant's *Batson* challenges and reached the merits of those claims and that in that history, the Louisiana Supreme Court had granted relief in only two cases.[6]

Third, that there were far more reported cases in which *Batson* has been successfully used to prevent defense strikes of white prospective jurors than state strikes of black jurors.[7] There were thirteen findings of *Batson/McCollum*[8] violations affirmed by the intermediate appellate courts and the Louisiana Supreme Court involving defense strikes of white prospective jurors.[9] There was one appellate case upholding a finding of defense discrimination against a black juror.[10]

---

[5] *Snyder v. Louisiana*, 2006 U.S. Briefs 10119, *Brief of Amicus Curiae, Louisiana Association of Criminal Defense Lawyers*, at 5.

[6] *Id.*

[7] *Id.* at 14.

[8] *Georgia v. McCollum*, 505 U.S. 42 (1992) (white defendant seeking to strike black jurors).

[9] *Snyder v. Louisiana*, 2006 U.S. Briefs 10119, *Brief of Amicus Curiae, Louisiana Association of Criminal Defense Lawyers*, at 14.

[10] *Id.*

II. A review of Louisiana appellate jurisprudence conducted since this Court decided *Snyder* shows that matters have become worse, not better

In *Snyder*, even after the remand to consider the case in light of *Miller-el v. Dretke*, 545 U.S. 231 (2005), the Louisiana Supreme Court afforded excessive deference to the trial court and a willingness to accept implausible reasons from the prosecutor that were at odds with his treatment of similarly placed jurors.

This court intervened and provided a model for analysis of *Batson* claims by reviewing courts. While emphasizing the "pivotal role" of trial courts in resolving *Batson* claims, this Court made it clear that a reviewing court should assess the plausibility of the reasons offered and cease its deference to the trial court where the lower court accepted implausible reasons.[11] This Court also made it clear that the implausibility of a proffered reason should be informed by a comparative analysis,[12] which is at the heart of so much equal protection jurisprudence.[13]

---

[11] *Snyder*, 552 U.S. at 477, 479-83 (the state's implausible explanation for striking Mr. Brooks "fails even under the highly deferential standard of review that is applicable here").

[12] *Id.* at 483-85.

[13] *See Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) ("Our cases have recognized successful equal protection claims brought by a 'class of one,' where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment.").

Finally, this Court emphasized that the offering of a pretextual reason gives rise to an inference of discrimination.[14]

Given the stark difference between the analysis previously favored by Louisiana courts and the analysis demonstrated by this Court in *Snyder*, one would expect the *Snyder* decision to have operated as a watershed in Louisiana *Batson* jurisprudence. Unfortunately, it has not.

Since *Snyder* was announced by this Court, there has not been a single defendant who has obtained relief arising from a *Batson* claim in Louisiana.

The closest any defendant came was Lawrence Jacobs, an African American defendant tried in Jefferson Parish, the jurisdiction of both the *Snyder* and *Dressner* cases. Indeed, Lawrence Jacobs was tried by one of the same prosecutors who tried the *Dressner* case and the trial judge was the same judge as in the *Snyder* case.[15] In *Jacobs*, the State used seven of eight peremptory challenges to strike six black prospective jurors and one Hispanic prospective juror from two separate voir dire panels.[16] The Fifth Circuit Court of Appeal for Louisiana granted *Batson* relief, citing extensively to *Snyder*.[17] The Louisiana Supreme Court granted the state's application for review and without ordering briefing or argument issued a *per curiam* reversing the decision of the Court of Appeal.[18]

---

[14] *Snyder*, 552 U.S. at 484. ("The prosecution's proffer of this pretextual explanation naturally gives rise to an inference of discriminatory intent.")

[15] Judge Kernan Hand presided over both *Jacobs* and *Snyder*. *State v. Snyder*, 874 So. 2d 739, 739 (2004); *State v. Jacobs*, 13 So. 3d 677, 677 (La. App. 5 Cir. 2009). Terry Boudreaux prosecuted both cases. *Id.*; *State v. Dressner*, ___ So. 3d ___ (La. 2010); 08-1366 (La. 07/06/10); 2010 La. LEXIS 1656, Pet. App. A; *Jacobs*, 32 So. 3d 227.

Looking to all of the post-*Snyder* appellate cases involving step three of the *Batson* analysis, the information supplied in the *Snyder amicus* brief may be updated as follows.[19]

First, since *Snyder* was announced, the intermediate appellate courts in Louisiana have reviewed 15 trial court denials of defense *Batson* challenges and have granted relief to the defendant in only one case (as discussed above, relief was subsequently reversed by the Louisiana Supreme Court).[20] A Court of Appeal

---

[16] *State v. Jacobs*, 13 So. 3d 677, 683 (La. App. 5 Cir. 2009).

[17] *Id.* at 686-87, 694.

[18] *State v. Jacobs*, 32 So. 3d 227 (La. 2010) (per curiam), *reh'g denied*, 37 So. 3d 994 (La. 2010) (per curiam).

[19] There have also been some cases post-*Snyder* dealing with step one of the *Batson* analysis but they are beyond the scope of this brief.

[20] *State v. Sarpy*, No. 10-700, 2010 La. App. LEXIS 1650 (La. App. 3 Cir. Dec. 8, 2010); *State v. Williams*, No. 45,755-KA, 2010 La. App. LEXIS 1536 (La. App. 2 Cir. Nov. 3, 2010); *State v. Kidd*, No. 45,638-KA, 2010 La. App. LEXIS 1509 (La. App. 2 Cir. Nov. 3, 2010); *State v. Horn*, No. 45,706-KA, 2010 La. App. LEXIS 1502 (La. App. 2 Cir. Nov. 3, 2010); *State v. Bess*, 47 So. 3d 524 (La. App. 2 Cir. 2010); *State v. Plauche*, 32 So. 3d 852 (La. App. 3 Cir. 2010), *writ denied*, 45 So. 3d 1070 (La. 2010);

(Continued on following page)

also granted interlocutory relief in one case, issuing an emergency mid-trial ruling reversing a trial court finding of a *Batson* violation.[21]

Second, since *Snyder* there have been two cases where the Louisiana Supreme Court has considered a defendant's *Batson* challenges and reached the merits of those claims.[22] In that history, the Louisiana Supreme Court has granted relief in zero cases, actually reversing appellate relief in one of them.

Third, there are now even more reported cases in which *Batson/McCollum* has been successfully used to prevent defense strikes of white prospective jurors. There were six findings of *Batson/McCollum* violations affirmed by the intermediate appellate courts and the Louisiana Supreme Court involving defense

---

State v. Wilson, 28 So. 3d 394 (La. App. 5 Cir. 2009), *writ denied*, 38 So. 3d 299 (La. 2010); *State v. Holder*, 25 So. 3d 920 (La. App. 2 Cir. 2009), *writ denied*, *State ex rel. Johnson v. State*, No. 2009-KH-2788, 2010 La. LEXIS 2854 (La. Dec. 10, 2010); *State v. Collins*, 12 So. 3d 1069 (La. App. 2 Cir. 2009); *State v. Jacobs*, 13 So. 3d 677 (La. App. 5 Cir. 2009), *vacated*, 32 So. 3d 227 (La. 2010) (per curiam); *State v. Palms*, No. 08-553, 2008 La. App. Unpub. LEXIS 676 (La. App. 3 Cir. 2008), *writ denied*, 36 So. 3d 241 (La. 2010); *State v. Brastfield*, 3 So. 3d 9 (La. App. 4 Cir. 2008); *State v. Jackson*, No. 08-428, 2008 La. App. Unpub. LEXIS 588 (La. App. 3 Cir. 2008); *State v. Harmon*, No. 08-454, 2008 La. App. Unpub. LEXIS 580 (La. App. 3 Cir. Nov. 5, 2008).

[21] *Holder*, 25 So. 3d 920.

[22] *State v. Dressner*, ___ So. 3d ___ (La. 2010); 08-1366 (La. 07/06/10); 2010 La. LEXIS 1656, Pet. App. A; and *Jacobs*, 32 So. 3d 227.

strikes of white prospective jurors.[23] One of those was in the *Dressner* case.

This review shows no positive change in the protection afforded by *Batson* to defendants in Louisiana. Indeed, there has been an explosion in reverse-*Batson* cases, six such cases in the two years since *Snyder*, in comparison to thirteen in the fourteen years before the *Snyder amicus*.[24]

As discussed below, these dismal statistics are matched by an equally dismal *Batson* jurisprudence in Louisiana that is antagonistic to the meaningful application of principles of equal protection to the jury selection process.

---

[23] *State v. Breaux*, No. 45,676-KA, 2010 La. App. LEXIS 1506 (La. App. 2 Cir. Nov. 3, 2010); *State v. Nelson*, 41 So. 3d 642 (La. App. 2 Cir. 2010); *State v. Prejean*, No. 2009 KA 0878, 2009 La. App. Unpub. LEXIS 639 (La. App. 1 Cir. Oct. 27, 2009); *State v. Jacobs*, 6 So. 3d 315 (La. App. 3 Cir. 2009); *Wyatt v. Hendrix*, 998 So. 2d 233 (La. App. 2 Cir. 2008); *State v. Jackson*, No. 08-428, 2008 La. App. Unpub. LEXIS 588 (La. App. 3 Cir. 2008).

[24] *State v. Tyler*, 723 So. 2d 939 (La. 1998); *State v. Dunn*, 831 So. 2d 862 (La. 2002); *State v. Scott*, 921 So. 2d 904 (La. 2006); *State v. Spencer*, 631 So. 2d 1363, 1365 (La. App. 5 Cir. 1994), *writ denied*, 649 So. 2d 400 (La. 1995); *State v. Moore*, 640 So. 2d 561 (La. App. 3 Cir. 1994); *State v. Ford*, 643 So. 2d 293 (La. App. 2 Cir. 1994); *State v. Payne*, 657 So. 2d 531 (La. App. 4 Cir. 1995); *State v. Ball*, 748 So. 2d 1239, 1241 (La. App. 2 Cir. 1999); *State v. Wade*, 832 So. 2d 977 (La. App. 2 Cir. 2002), *writ denied*, 840 So. 2d 1213 (La. 2003); *State v. White*, 850 So. 2d 751 (La. App. 2 Cir. 2003), *writ denied*, 872 So. 2d 510 (La. 2004); *State v. Stewart*, 866 So. 2d 1016 (La. App. 5 Cir. 2004), *writ denied*, 876 So. 2d 832 (La. 2004); *State v. Singleton*, 953 So. 2d 168 (La. App. 3 Cir. 2007); cf. *State v. Wilson*, 632 So. 2d 861 (La. App. 2 Cir. 1994) (Defense challenge of two white jurors disallowed; affirmed on appeal as to one of the jurors, reversed as to the other).

III. The Louisiana Supreme Court has adopted a method for considering historical and statistical evidence of discriminatory intent at odds with *Miller-el* and the other holdings of this Court

History and statistics may not be sufficient to establish on their own that peremptory strikes in *Dressner* were raced based. But they provide powerful circumstantial evidence undermining the State's explanations for its strikes and an invaluable context in which to assess the credibility of those reasons.

As this Court was at pains to point out in *Miller-el*:

> Although the move from *Swain* to *Batson* left a defendant free to challenge the prosecution without having to cast *Swain*'s wide net, the net was not entirely consigned to history, for *Batson*'s individualized focus came with a weakness of its own owing to its very emphasis on the particular reasons a prosecutor might give. If any facially neutral reason sufficed to answer a *Batson* challenge, then *Batson* would not amount to much more than *Swain*. Some stated reasons are false, and although some false reasons are shown up within the four corners of a given case, sometimes a court may not be sure unless it looks beyond the case at hand. Hence

> *Batson*'s explanation that a defendant may rely on "all relevant circumstances" to raise an inference of purposeful discrimination. 476 U.S., at 96-97, 90 L. Ed. 2d 69, 106 S. Ct. 1712.

Miller-el v. Dretke, 545 U.S. 231, 239-40 (2005).

This mode of analysis is to be contrasted with the approach taken by the Louisiana Supreme Court in *Dressner*:

> However, to argue previous capital convictions and death sentences originating from Jefferson Parish have been reversed on racial discrimination injury selection, *see State v. Harris*, 01-0408 (La. 6/21/02), 820 So.2d 471 and *Snyder v. Louisiana*, 552 U.S. 472, 128 S.Ct. 1203, 1207, 170 L.Ed.2d 175 (2008), does not lead to the logical conclusion the same happened in the present case. Here, the State gave its reasons on the record for excusing jurors, and the district court deemed those reasons race-neutral. Thus, even accepting appellate counsel's premise the Jefferson Parish District Attorney's Office has historically shown a racial bias in selecting juries, there must be some demonstrable proof such was the case in the present trial for defendant's argument to succeed. Yet, in all of the *Batson* challenges exercised in defendant's capital trial and reproduced in this appendix, supra, the State gave its reasons on the record for excusing the jurors, and in every challenge, the district court ruled those reasons race-neutral,

> suggesting a clear intent on the part of the current prosecutors to distance themselves from the errors of their office in the past. Notwithstanding any historical precedent in Jefferson Parish to the contrary, we find no racial discrimination tainted jury selection in the instant case.

State v. Dressner, Pet. App. B at 134A-35A.

Instead of looking beyond the four corners of a case to determine whether stated reasons are false, the Louisiana Supreme Court determines that the stated reasons are not false so that it does not have to look beyond the four corners of the case.

This approach is in direct conflict with this Court's holdings and provides a mode of analysis that renders historical and statistical evidence wholly irrelevant.

Indeed, in *Dressner*, it led the Louisiana Supreme Court to the extraordinary conclusion that the prosecutors, who used seven of their nine challenges to remove African Americans from the jury, had by doing so turned over a new leaf and distanced themselves from the historical practice of discrimination documented by petitioner.

The Louisiana Supreme Court's approach to historical evidence in *Dressner* has an analogue in their treatment of statistical patterns of discrimination appearing within cases. Once again, the Court considers the offered explanations in isolation and finding them race neutral, determines that the statistical pattern is therefore meaningless. This analysis was deployed when the court reversed *Batson* relief by an intermediate appellate court in *Jacobs*:

> The appellate court found the state used seven of the eight peremptory challenges exercised to remove non-white prospective jurors. From a purely statistical perspective, the court of appeal found the state used 87% of its peremptory strikes to challenge non-white prospective jurors, in a venire where non-white prospective jurors comprised less than 19% of the prospective jurors . . . However, we have more than a bare statistical viewpoint to gauge the appropriateness of the peremptory challenges in this case. For three of those peremptory challenges, the appellate court found there was no valid *Batson* claim that would invalidate the strike, . . . [O]ur review of the two peremptory challenges which the court of appeal determined were motivated by a racially-discriminatory intent cannot be supported as such. Consequently, we have found that, after a comprehensive review of these issues, five of the seven state peremptory challenges of non-white prospective jurors did not evince a racially-discriminatory intent. Thus, the statistical argument fails to have merit upon further inquiry.

Jacobs, 32 So. 3d at 236; *see also State v. Dressner* at Pet. App. B, at 93A-94A (discounting statistical evidence because "a review of the voir dire record as a whole indicates the State articulated race and gender-neutral reasons for each of the eight challenges about which defendant now complains.").

Amicus Curiae will not repeat the overwhelming evidence of a history and pattern of discrimination offered by Petitioner in this case and referred to previously by *amici* in its brief in *Snyder*. It is worth noting however that the grave issues of racial discrimination throughout Louisiana's justice system, specifically when it comes to jury service, have not diminished since *Snyder*. For example, in a recent capital case in Caddo Parish, a juror described the indignity of having to walk past a confederate flag to enter the courthouse:

> Juror Staples: You speak of justice here in these, you call these halls of justice or the courthouse, this is the place where justice is administered and so on. I came to Shreveport in 1975. Okay. There was an issue some years back, I don't mean to get off the subject, but I guess it would be considered also in regards to say the law, in front of the courthouse, the Confederate flag flies. Okay. This is a symbol of the most, to me, one of the most heinous crimes ever committed to another member of the human race, and I just don't see how you could say that, I mean, you're here for justice, and then again you overlook this great injustice by continuing to fly this flag which continues to say put salt

> in the wounds of say people of color, I don't buy it. I don't buy it.[25]

Louisiana is by no means the only state still grappling with the problem of race discrimination during jury selection. A recent report by the Equal Justice Initiative documents the persistent and widespread failure to protect potential jurors from racial discrimination.[26]

---

[25] Juror Carl Staples, *State of Louisiana v. Felton Dorsey*, No. 2010-KA-0216, Record at 6036-6037, Appeal from Conviction and Death Sentence Imposed, 1st JDC District Ct. No. 251,406 (appeal pending). For a description of the historical context of the flag's placement at the courthouse and the dangers posed by its presence, see Cecelia Trenticosta & William C. Collins, *Death and Dixie: How the Courthouse Confederate Flag Influences Capital Cases in Louisiana*, 27 Harv. J. Racial & Ethnic Just. (forthcoming 2011), *available at* http://ssrn.com/abstract=1734397 (arguing that the flag endangers due process rights and privileges and immunities of national citizenship in criminal proceedings). The continued presence of confederate symbols adorning Louisiana courthouses is also documented in "Race and Jury Selection," Equal Justice Initiative at http://www.eji.org/eji/raceandpoverty/juryselection (last viewed January 4, 2011).

[26] "Illegal Racial Discrimination in Jury Selection: A Continuing Legacy," Equal Justice Initiative, August 2010, available at http://eji.org/eji/files/62510%20Edited%20Tutwiler%20version%20Final%20Report%20from%20printer%20online.pdf (last viewed January 4, 2011).

IV. Trial court scrutiny has not improved and appellate review has only become more deferential in the wake of *Snyder*

In order to provide for the meaningful application of *Batson* in Louisiana following *Snyder*, it was important for the Louisiana courts to take two important points from the decision. First, that trial courts are expected to carefully scrutinize the reasons offered in response to a *Batson* challenge and second, that appellate courts are not to rubber stamp trial court findings.

Unfortunately, the post-*Snyder* jurisprudence does not demonstrate this shift. Trial courts continue to engage in superficial analysis directed simply to satisfying the step two requirement of race neutrality.[27] And even the most implausible reasons are accepted without demurrer and, as in *Dressner*, efforts to test or challenge those reasons are rebuffed.[28]

---

[27] *For example, see Wilson*, 28 So. 3d at 403, 406 (following the prosecutor's offer of race neutral reason for a challenged strike, trial judge simply indicated "alright" and listed his own problems with the prospective juror, and subsequently responded to the defense's *Batson* objection, noting that the number of state strikes against African-Americans "does not show a pattern, it just shows that there is, you know, more African Americans on this top panel.").

[28] *For example, see Collins*, 12 So. 3d at 1079-80 (Even though both the trial and appellate courts declined to find that the justification that the prosecutor simply forgot to ask the juror any questions during voir dire was genuine and credible

(Continued on following page)

Similarly, appellate courts continue to defer to trial court rulings, ignoring many factors that bear on the credibility of the state's race neutral reasons. In addition to history and statistics, mentioned above, other factors include: the passage of time between the initial strike and the prosecutor's offer of race neutral justification,[29] and the existence of similarly situated comparators.[30]

Despite the fact that *Snyder* was the second time that this Court has intervened to reverse a trial court's step three finding, it has come to stand in Louisiana for the proposition that appellate courts must defer virtually completely to trial courts.

◆

---

they ruled that at the point the *Batson* objection was lodged, the prosecution had only stricken two African-American jurors.).

[29] *Horn*, 2010 La. App. LEXIS 1502.

[30] *Brastfield*, 3 So. 3d at 11 (Prosecution explained its failure to strike similarly situated white juror by noting that the juror was a lawyer and the prosecutor never struck lawyers. However, the prosecutor only developed this justification in response to the defense's observation that the prosecution had failed to strike a juror who was similarly situated with regard to jury service.).

CONCLUSION

The lamentable fact is that following the decision in *Snyder*, *Batson* continues to fail in its goal of protecting minority jury participation in Louisiana. Indeed, the Fourteenth Amendment in Louisiana presently appears more successful in protecting white prospective jurors from being struck.

The wrongheaded analysis of historical and statistical evidence in Louisiana, the superficial analysis by trial courts and the ultra-deferential review by appellate courts in Louisiana have stripped *Batson* of its purpose. The *Dressner* case provides a fitting vehicle to address these issues not least because the prosecutor in *Dressner* (and *Jacobs*) has subsequently been elected to the position of District Court judge in Jefferson Parish and is now called upon to rule upon *Batson* challenges within the framework described by the Louisiana Supreme Court.

In short, in the absence of intervention by this Court there is little prospect that matters will improve.

Respectfully submitted,

EDWARD KING ALEXANDER, JR.*
901 Lakeshore Drive, Suite 700
Lake Charles, LA 70602
(337) 436-1718
ekalexander@pdolaw.org

Counsel of Record